

On the Constitutionality of Ohio’s Proposed “Heartbeat Bill”

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I. INTRODUCTION

When it comes to women’s reproductive rights, particularly the constitutional right to abortion, there are not all that many things that those who think of themselves as for a “right to life” and those who think of themselves as for a “right to choose” agree on. And so it seems significant that nearly everyone who has studied Ohio’s proposed “heartbeat bill,” Ohio House Bill 125 [hereinafter H.B. 125], as it was debated and passed by the Ohio House of Representatives,¹ as well as the relevant U.S. Supreme Court precedents on the

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¹ H.B. 125, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (as passed by Ohio House, June 28, 2011).

right to abortion, agrees on this much: H.B. 125 is broadly unconstitutional, if not unconstitutional in every last respect.

Much as anything else, the testimony supporting this legislation in the Ohio legislature was notable for the absence of any serious and strong argument suggesting that H.B. 125 is, in basic form and broadly speaking, a constitutionally legitimate exercise of the State's police powers.² To the contrary, the proposed legislation so obviously runs afoul of existing constitutional rules in important respects that its political opponents have included not only various reproductive rights organizations but also, practically if not officially, Ohio Right to Life.³ This organization's concerns do not stem from any objection to the legislation on a point of principle. Ohio Right to Life is fully committed to the view that human life begins at conception, hence

² See *Testimony Regarding H.B. 125, The Heartbeat Bill: Hearing on H.B. 125 Before the S. Health, Human Servs. & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 4–6 (Ohio 2011) [hereinafter *Forte Senate Testimony*] (statement of Professor David F. Forte, Cleveland State University); *Testimony Regarding H.B. 125, The Heartbeat Bill: Hearing on H.B. 125 Before the H. Health & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 2–3 (Ohio 2011) [hereinafter *Forte House Testimony*] (statement of Professor David F. Forte, Cleveland State University); *Analysis of H.B. 125, The Heartbeat Bill: Hearing on H.B. 125 Before the H. Health & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 4 (Ohio 2011) [hereinafter *Weber House Testimony*] (statement of Walter M. Weber, Senior Litigation Counsel, The American Center for Law and Justice). Indeed, considerable pro-life authority agrees that H.B. 125 is broadly unconstitutional. See *Interested Party Testimony on Substitute HB 125: Hearing on H.B. 125 Before the S. Health, Human Servs. & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 3 (Ohio 2011) [hereinafter *Bopp Senate Testimony*] (statement of James Bopp, Jr., General Counsel, National Right to Life Committee); *Interested Party Testimony on Substitute H.B. 125: Hearing on H.B. 125 Before the S. Health, Human Servs. & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 6 (Ohio 2011) [hereinafter *Strang Senate Testimony*] (statement of Professor Lee J. Strang, University of Toledo College of Law, and Board Member, Toledo Area Right to Life). This is not to say that some of its provisions have not been said to be constitutionally permissible exercises of State power. See, e.g., *infra* Parts III.B.2.a (discussing post-viability application of H.B. 125) and III.B.2.b (discussing H.B. 125's disclosure and acknowledgment rule).

³ See *Interested Party Testimony on Substitute House Bill 125: Hearing on H.B. 125 Before the S. Health, Human Servs. & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 1 (Ohio 2011) [hereinafter *Krider Senate Testimony*] (statement of Stephanie Krider, Director of Legislative Affairs, Ohio Right to Life); Letter from Marshal M. Pitchford, Chairman, Ohio Right to Life, to Lynn Wachtmann, Chairman, Health & Aging Comm., Ohio House of Representatives 1–2 (May 6, 2011) (on file with author). This even though there appears to have been some dissension in the Ohio Right to Life's Board's ranks. See, e.g., *Interested Party Testimony on Substitute House Bill 125: Hearing on H.B. 125 Before the S. Health, Human Servs. & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 2–3 (Ohio 2011) [hereinafter *Pitchford Senate Testimony*] (statement of Marshal M. Pitchford, Chairman, Ohio Right to Life) (noting the 9–2 vote by the Board “to neither support nor oppose House Bill 125 at this time”); *Hearing on H.B. 125 Before the H. Health & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 1 (Ohio 2011) (statement of Julie N. Busby, Board Member, Ohio Right to Life); see also *Interested Party Testimony on Substitute HB 125: Hearing on H.B. 125 Before the S. Health, Human Servs. & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 3 (Ohio 2011) (statement of John Coats, Trustee, Ohio Right to Life).

maintains that abortion is the taking of human life, hence opposes the Supreme Court's decision in *Roe v. Wade*⁴ as the fountainhead of a jurisprudence protecting a right to kill that should be overturned.⁵ In this light, Ohio Right to Life's objection to H.B. 125 is not that it goes too far to protect the unborn, but that it is so out of constitutional bounds under existing Supreme Court precedents that its passage, if and when challenged in court, would serve to strengthen and deepen existing pro-choice rules, with the practical effect of undermining, hence dis-serving, a long-term and deliberate strategy that has been working, carefully and assiduously for years, to chip away incrementally at what remains of the Supreme Court's original *Roe* decision.⁶ Just as significantly, other prominent right-to-life supporters of H.B. 125 have not strenuously (in public, anyway) disagreed with the view that the proposed legislation violates existing reproductive rights decisions that have been handed down by the U.S. Supreme Court. Their view, articulated in different ways, is that this legislation, were it to become law, could serve as a vehicle for speeding the demise of *Roe* and its progeny in their entirety, an end-game that they, like Ohio Right to Life and others committed to a right-to-life politics, are for.⁷

⁴ 410 U.S. 113 (1973).

⁵ See, e.g., *Interested Party Testimony on Substitute HB 125: Hearing on H.B. 125 Before the S. Health, Human Servs. & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 1 (Ohio 2011) [hereinafter *Gonidakis Senate Testimony*] (statement of Michael Gonidakis, Executive Director, Ohio Right to Life) ("We reject the United States Supreme Court's decision of *Roe v. Wade* in 1973 and we continue to work tirelessly for that day when *Roe* will be overturned and each state will have the opportunity to establish its own pro-life standards."); *Krider Senate Testimony*, *supra* note 3, at 1 ("Ohio Right to Life exists to overturn *Roe*."); Letter from Marshal M. Pitchford to Lynn Wachtmann, *supra* note 3, at 1 ("Neither you nor I desire anything less than the overturning of *Roe v. Wade*.").

⁶ See, e.g., *Pitchford Senate Testimony*, *supra* note 3, at 2 ("As legal scholars have informed us, every time *Roe* is affirmed, it becomes that much more difficult to persuade a differently constituted Court that it should abandon the framework of *Roe* and *Casey*."); see also *Krider Senate Testimony*, *supra* note 3, at 2, 4 (noting both the importance of timing and also that there is support within Ohio Right to Life for H.B. 125 in principle). Professor Lee Strang reached a similar conclusion. See *Strang Senate Testimony*, *supra* note 2, at 7–11; cf. Bernard Schlueter, Letter to the Editor, 'Heartbeat Bill' Won't Get the Job Done, COLUMBUS DISPATCH, Apr. 9, 2011, at A11. For some thoughts on the larger right-to-life strategy, see generally Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008).

⁷ See, e.g., *Hearing on H.B. 125 Before the S. Health, Human Servs. & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 1 (Ohio 2011) [hereinafter *Porter Senate Testimony*] (statement of Janet (Folger) Porter, Founder and President, Faith2Action) (quoting Walter M. Weber as saying H.B. 125 is "the next Partial Birth Abortion Ban—which will transform the nation and the courts"); *Testimony Regarding H.B. 125, The Heartbeat Bill: Hearing on H.B. 125 Before the S. Health, Human Servs. & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 5 (Ohio 2011) [hereinafter *Weber Senate Testimony*] (statement of Walter M. Weber, Senior Litigation Counsel, The American Center for Law and Justice) ("[T]he prohibition section of the bill calls upon the Court to allow states to provide a level of protection for unborn children against abortion that is more consonant with basic human dignity."); *Hearing on H.B. 125 Before the S. Health, Human Servs. & Aging Comm.*, 129th Gen.

Generally speaking, it might be thought that this would not be the effect of H.B. 125 were it constitutional under *Roe* and the cases it has spawned.

With so much agreement and such broad convergence on the conclusion that H.B. 125 is broadly unconstitutional, it might seem that there is little to say about exactly why and in what ways the measure runs afoul of existing constitutional guarantees articulated by the Supreme Court. But as an aid to understanding some of the more significant, and in some cases nonobvious, reasons for regarding the legislation as unconstitutional, and as a device for avoiding some misunderstandings that may remain, there is this, in the following pages. After an analysis of H.B. 125's constitutionality is delivered, an interesting and important question that the proponents of this legislation have raised is considered: Are there signs in the latest major Supreme Court abortion decision, *Gonzales v. Carhart*,⁸ for thinking that a majority of the Supreme Court is prepared to reconsider and topple *Roe* and its progeny? Toward this end, discussion is divided into three main Parts. Part II is a description of H.B. 125's major features. Part III analyzes these dimensions of the legislation under existing constitutional precedents. Part IV takes up the question about whether *Gonzales v. Carhart* holds out any reason for the kind of hope that proponents of H.B. 125, along with some of its supporters, have publicly espoused. A conclusion in Part V formally concludes, followed by a brief Postscript.

II. HOUSE BILL 125'S MAIN MOVING PIECES

The proposed heartbeat bill, H.B. 125, as passed by the Ohio House of Representatives, is a far-reaching right-to-life measure that entails a far-reaching abortion ban. The legislation has a number of moving pieces, but its basic schema (with some details to the margins) works basically as follows.

First, barring a "medical emergency"—defined as "a condition that in the physician's good faith medical judgment, based upon the facts known to the physician at that time, so endangers the life of the pregnant woman or a major bodily function of the pregnant woman as to necessitate the immediate performance or inducement of an abortion"⁹—H.B. 125 requires that, before performing an abortion on a pregnant woman at any time during her pregnancy, a determination must be made whether "the fetus the pregnant woman is

Assemb., Reg. Sess. 2 (Ohio 2011) (statement of Andy Douglas, Director, Christians for Constitutional Awareness) (noting argument made by Dr. Jack Willke before the Senate Health, Human Services, and Aging Committee that H.B. 125 "will . . . be the arrow in the heart of *Roe* that brings abortion to an end"); see also *Krider Senate Testimony*, *supra* note 3, at 2 (discussing the idea, but suggesting it "will likely backfire").

⁸ 550 U.S. 124 (2007).

⁹ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(B)(6)).

carrying has a detectable fetal heartbeat.”¹⁰ Failure to test in non-emergency cases can trigger professional sanctions for licensed physicians.¹¹

Second, a separate provision of H.B. 125 adds to the first by requiring any “person who intends to perform an abortion on a pregnant woman [to] determine if there is the presence of a fetal heartbeat of the unborn human individual that the pregnant woman is carrying according to standard medical practice.”¹² If a fetal heartbeat is thus detected, two related provisions come into play.

The first is what might be called a disclosure and acknowledgment rule. It has two steps of its own. Initially, on the disclosure side, it provides:

The person intending to perform the abortion shall inform the pregnant woman in writing that the unborn human individual that the pregnant woman is carrying has a fetal heartbeat and shall inform the pregnant woman, to the best of the person’s knowledge, of the statistical probability of bringing the unborn human individual to term based on the gestational age of the unborn human individual possessing a detectable fetal heartbeat.¹³

After this disclosure comes the required acknowledgment from the pregnant woman. Having received the legally required information, the pregnant woman is to:

[S]ign a form acknowledging that [she] has received information from the person intending to perform the abortion that the unborn human individual that [she] is carrying has a fetal heartbeat and that [she] is aware of the statistical probability of bringing the unborn human individual that [she] is carrying to term.¹⁴

¹⁰ *Id.* (to enact OHIO REV. CODE § 2919.19(C)(1)). The testing imperative applies to any person who does or would perform an abortion, *id.*, though both the “medical emergency” provision and the penalty provision of the testing imperative expressly apply to physicians. *Id.* (to enact OHIO REV. CODE § 2919.19(B)(6), (C)(4)).

¹¹ *Id.* (to enact OHIO REV. CODE § 2919.19(C)(4)); accord LISA MUSIELEWICZ, OHIO LEGIS. SERV. COMM’N, BILL ANALYSIS OF AM. SUB. H.B. 125, 129th Gen. Assemb., Reg. Sess., at 4 (2011). The professional sanctions for physicians for the failure to test for a fetal heartbeat prior to performing an abortion, except in cases of “medical emergency,” are separate from the criminal sanctions provided elsewhere in H.B. 125 for performing an abortion after a fetal heartbeat has been detected according to the bill’s terms. Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(1), (E)(5)).

¹² Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(C)(2)).

¹³ *Id.* (to enact OHIO REV. CODE § 2919.19(D)(2)(a)).

¹⁴ *Id.* (to enact OHIO REV. CODE § 2919.19(D)(2)(b)).

What is unusual about this disclosure and acknowledgment rule, and why, though it has elsewhere been referred to as an informed consent provision,¹⁵ it is not generally properly described in those terms, is that while the provision entails the disclosure and acknowledgment of the receipt of information about the fetus's heartbeat and the likelihood the fetus will be brought to term if a pregnancy is not ended, the provision does not ordinarily give the pregnant woman any opportunity to exercise any choice about whether to terminate her pregnancy. While it might do so in some circumstances,¹⁶ in its usual operation, it will be all information—no consent.

This is because—and this is the second step following the detection of a fetal heartbeat—H.B. 125, in its next major provision, holds, subject to three important exceptions, that: “no person shall knowingly perform an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual that the pregnant woman is carrying and whose fetal heartbeat has been detected according to the requirements of [the bill].”¹⁷ Any person who violates this prohibition is “guilty of performing an abortion after the detection of a fetal heartbeat, a felony of the fifth degree.”¹⁸ By virtue of a conviction for such a crime, professional sanctions against a physician could follow.¹⁹

What are the three exceptions to this broad criminal liability for violation of H.B. 125's terms?

One exception grants a “pregnant woman on whom an abortion is performed” in violation of certain of H.B. 125's terms immunity from criminal and civil liability.²⁰

¹⁵ Sources include *Testimony Regarding H.B. 125: Hearing on H.B. 125 Before the H. Health & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 8 (Ohio 2011) [hereinafter *Spindelman House Testimony*] (statement of Professor Marc Spindelman, The Ohio State University Michael E. Moritz College of Law). See also, e.g., LISA MUSIELEWICZ, OHIO LEGIS. SERV. COMM'N, BILL ANALYSIS OF AM. SUB. H.B. 125, 129th Gen. Assemb., Reg. Sess., at 7 (2011).

¹⁶ See, e.g., Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)(a)).

¹⁷ *Id.* (to enact OHIO REV. CODE § 2919.19(E)(1)).

¹⁸ *Id.* (to enact OHIO REV. CODE § 2919.19(E)(5)).

¹⁹ See OHIO REV. CODE ANN. § 4731.22(B)(10) (Supp. 2012) (requiring the state medical board to take disciplinary action against a certificate holder for the “[c]ommission of an act that constitutes a felony in this state”); see also *id.* § 4723.28(B)(4) (permitting the state board of nursing to take disciplinary action for the “[c]onviction of . . . any felony”). Against H.B. 125's post-heartbeat criminal abortion ban and operating in tandem with it, the disclosure and acknowledgment rule thus does not generally function as an informed consent measure: The disclosure and processing of information is not automatically followed by an opportunity for a pregnant woman to consent to a medically indicated procedure of her choice.

²⁰ Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(G)).

A second exception contemplates the possibility of a medical mistake. No criminal liability attaches under H.B. 125 if an abortion is performed when there is actually a fetal heartbeat to be heard, if:

[T]hat person [the person performing the abortion] has performed an examination for the presence of a fetal heartbeat in the fetus utilizing standard medical practice and that examination does not reveal a fetal heartbeat or the person [performing the abortion] has been informed by a physician who has performed the examination for fetal heartbeat that the examination did not reveal a fetal heartbeat.²¹

A third exception from criminal liability for performing an abortion where a fetal heartbeat is detectable and detected is an exception—limited in important ways—for a pregnant woman's health. Like the provision for "medical emergency" which can premit the operation of the measure's abortion ban,²² H.B. 125's health exception allows an abortion to be performed even in the presence of a fetal heartbeat under certain specified circumstances. H.B. 125 is not violated when a person performs an abortion after a fetal heartbeat has been detected if "that person performs a medical procedure designed to or intended, in that person's reasonable medical judgment, to prevent the death of a pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman."²³

No small aside, not only does H.B. 125's health exception differ in its scope from its "medical emergency" exception,²⁴ but it is, perhaps as (if not more)

²¹ *Id.* (to enact OHIO REV. CODE § 2919.19(E)(3)).

²² *See infra* note 24.

²³ Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)(a)). This health exception language mirrors the language from Ohio's late-term, post-viability abortion ban, codified in section 2919.17(B)(1) of the Ohio Revised Code. *See* LISA MUSIELEWICZ, OHIO LEGIS. SERV. COMM'N, BILL ANALYSIS OF AM. SUB. H.B. 125, 129th Gen. Assemb., Reg. Sess., at 5 (2011) (discussing H.B. 125's "health exception" and noting the parallels with the language from House Bill 78, Ohio's late-term, post-viability abortion ban). Looking to the language of the late-term, post-viability abortion ban, "[s]erious risk of the substantial and irreversible impairment of a major bodily function of the woman" is defined as any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function." *Id.* at 11. Further:

A medically diagnosed condition that constitutes a 'serious risk of the substantial and irreversible impairment of a major bodily function' includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes; may include, but is not limited to, diabetes and multiple sclerosis; and does not include a condition related to the woman's mental health.

Id. (citing OHIO REV. CODE ANN. § 2919.16(K) (Supp. 2012)).

²⁴ *Compare* Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(B)(6)) (defining "medical emergency" as "a condition that in the physician's good faith medical judgment, based upon the facts known to the physician at that

importantly, a more constricted version of the health exception that existed in the legislation as initially introduced. When H.B. 125 was originally proposed, it allowed for abortions undertaken after the detection of a fetal heartbeat when necessary “to preserve the life or health of the pregnant woman.”²⁵ The health exception language was tightened by amendment, the effect of which was to synch this provision with another abortion measure, which contains health exception language to similar effect.²⁶

Raising the stakes, H.B. 125 also presently demands a written articulation “under penalty of perjury” both that a person performing a medical procedure under the bill’s health exception is doing so because the procedure is “necessary, to the best of that person’s reasonable medical judgment,” and also precisely what the pregnant woman’s medical condition is that the “medical procedure performed . . . will assertedly address.”²⁷ Additionally, also under penalty of perjury, the person performing this procedure must record the “medical rationale” behind the conclusion that it is required to avoid the pregnant woman’s death or to avoid “a serious risk of the substantial and irreversible impairment of [one of her] major bodily function[s].”²⁸ All this, like certain record-keeping requirements,²⁹ is presumably meant to ensure there are medical records to review in order to check later on for legal violations that do not qualify as medical mistakes.

Though H.B. 125 contains other provisions, including, significantly, rules about the authority of the Ohio Director of Health to specify how these procedures are to be undertaken,³⁰ these are the crucial moving pieces needed to

time, so endangers the life of the pregnant woman or a major bodily function of the pregnant woman as to necessitate the immediate performance or inducement of an abortion”), *with id.* (to enact OHIO REV. CODE § 2919.19(E)(2)(a)) (providing for a health exception that encompasses “medical procedure[s] designed to or intended, in [the] . . . reasonable medical judgment [of the person performing the procedure], to prevent the death of a pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman”).

²⁵ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (as introduced, Feb. 24, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)). Analysis of H.B. 125’s post-viability operation is below. *See* discussion *infra* Part III.B.2.

²⁶ Representative Robert Mecklenborg offered the amendment to H.B. 125 narrowing the health exception, which brought it into alignment with Ohio House Bill 78, the state’s late-term, post-viability abortion ban. OHIO H. OF REPS. JOURNAL, 129th Gen. Assemb., Reg. Sess., June 28, 2011, at 920–21 (2011). To understand the alignment of these provisions, compare H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)(a)), with Act of July 13, 2011, § 1, 2011 OHIO LAWS 4 (enacting OHIO REV. CODE § 2919.17(B)(1)(b)). *See also supra* note 23.

²⁷ Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)(b)).

²⁸ *Id.*

²⁹ *Id.* (to enact OHIO REV. CODE § 2919.19(E)(2)(c)).

³⁰ *Id.* (to enact OHIO REV. CODE § 2919.19(C)(3), (D)(3)). Unclear at this point is how far the Director of Health might go in promulgating rules governing the appropriate medical

analyze the proposed legislation for its basic conformity with existing constitutional rules.

Before turning to that analysis, it is worth highlighting an obvious but important feature of H.B. 125: It is a wall-to-wall abortion regulation scheme. At no point during a pregnancy—except in a sense for reasons of “medical emergency”—is a pregnant woman seeking an abortion not subject to having her reproductive choices governed in some way by this measure.³¹ As a broad rule, a pregnant woman is never at liberty either entirely on her own or in consultation with her physician to decide whether to terminate a pregnancy without knowing the heartbeat status of the fetus she is carrying. H.B. 125 thus keys her abortion-related reproductive rights to the heartbeat status of the fetus she is carrying. Limited medical emergencies or dangers to her life or serious risks to her health aside, the legislation practically imagines a pregnant woman has a right to terminate an unwanted pregnancy, if any at all, only when her fetus has no detectable heartbeat that has been medically detected.

III. A CONSTITUTIONAL ASSESSMENT OF HOUSE BILL 125

How does the basic legal regime that H.B. 125 contemplates look when lined up against the U.S. Supreme Court’s existing constitutional abortion rules?³²

A. *A Very Brief Description of the Existing Constitutional Rules*

The existing framework for analyzing restrictions on abortion can be succinctly stated for present purposes.

First, the State has interests—independent from the pregnant woman’s—that may be expressed through various sorts of legislation throughout the course of a woman’s pregnancy. These interests include: the State’s interest in the

procedures for detecting the presence of a fetal heartbeat. One possibility is suggested by a proposal taken up by the Virginia legislature that would effectively have mandated that at least some pregnant women seeking abortions endure involuntary transvaginal ultrasounds. See Laura Vozzella & Anita Kumar, *In Va., Nitty-Gritty Knocks Abortion Bill Off Fast Track*, WASH. POST, Feb. 24, 2012, at A1. The national backlash that this proposal precipitated eventually led the legislature and Virginia’s Governor to reverse course and press for a more limited “external ultrasound” requirement for women seeking abortions. See Anita Kumar, *Virginia Senate Passes Modified Ultrasound Bill*, WASH. POST, Feb. 29, 2012, at B1. With thanks to one of the *Journal*’s editors for the reminder, there is also a question about what medical facts the Director of Health might be in a position to require physicians to disclose to patients as the standard of care consistent with H.B. 125.

³¹ Even when she is permitted to terminate her pregnancy either because no fetal heartbeat has been detected or otherwise for health reasons the bill allows, that choice is still governed by this measure.

³² See *Spindelman House Testimony*, *supra* note 15, at 3–7.

(potential) life of the fetus,³³ the State's interest in the pregnant woman's life and health,³⁴ and the State's interest in regulating medical standards and the medical profession.³⁵

³³ The Court has formulated this interest in various terms. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) ("legitimate and substantial interest in preserving and promoting fetal life"); *id.* at 146 ("legitimate interest of the Government in protecting the life of the fetus"); *id.* at 158 ("the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("[T]he State has legitimate interests from the outset of the pregnancy in . . . the life of the fetus that may become a child."); *id.* at 853 ("legitimate interests in protecting prenatal life"); *id.* at 858 ("state interest in fetal protection"); *id.* at 870 (plurality opinion) ("legitimate interest in promoting the life or potential life of the unborn"); *id.* at 871 ("legitimate interests in . . . protecting the potential life within her"); *id.* at 872 ("State's interest in promoting fetal life"); *id.* at 873 ("[T]he State has an interest in protecting the life of the unborn."); *id.* at 875 ("State's interest in the potential life within the woman"); *id.* at 876 ("[T]he State has an interest in protecting fetal life or potential life."); *Roe v. Wade*, 410 U.S. 113, 150 (1973) ("the State's interest—some phrase it in terms of duty—in protecting prenatal life"); *id.* at 154 ("[A] State may properly assert important interests . . . in protecting potential life."); *id.* at 155 ("[A]t some point the state interests as to . . . prenatal life[] become dominant."); *id.* at 162 (the State "has still *another* important and legitimate interest in protecting the potentiality of human life"); *id.* at 163 ("interest in potential life"); *id.* ("[T]he State is interested in protecting fetal life after viability . . ."); *see also Casey*, 505 U.S. at 897–98 (holding that a spousal notification requirement justified by the "husband's interest in the life of the child his wife is carrying," and coupled with the State's interest in potential life, does not outweigh "a wife's liberty"); *cf. Casey*, 505 U.S. at 949, 974 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("potential life of the fetus"); *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting) ("life or potential life of the fetus").

³⁴ *Casey*, 505 U.S. at 871 (plurality opinion) ("[T]he State has legitimate interests in the health of the woman . . ."); *id.* at 882 (joint opinion of O'Connor, Kennedy & Souter, JJ.) ("Those [earlier abortion decisions] . . . recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. It cannot be questioned that psychological well-being is a facet of health." (citation omitted)); *id.* at 900 (concluding that the recordkeeping and reporting requirements of the statute relate to the State's interest in health); *Roe*, 410 U.S. at 150 ("[T]he State retains a definite interest in protecting the woman's own health and safety . . ."); *id.* at 154 ("important interests in safeguarding health"); *id.* at 162 ("[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . .").

³⁵ *Gonzales v. Carhart*, 550 U.S. at 157 ("interest in protecting the integrity and ethics of the medical profession" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997))); *id.* at 158 ("legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn"); *Roe*, 410 U.S. at 150 ("The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient."); *id.* at 154 ("important interests . . . in maintaining medical standards"); *see also Gonzales v. Carhart*, 550 U.S. at 159 ("[The] lack of information concerning the way in which the fetus will be killed . . . is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed." (citation omitted)); *id.* at 160.

Second, lined up against the State's interests are the important, and constitutionally recognized, autonomy interests the pregnant woman has in choosing for herself whether to continue or to terminate her pregnancy.³⁶ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁷ the Supreme Court explained that, prior to fetal viability, "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."³⁸

To safeguard the abortion right from State efforts that would either take it away or unduly constrain it, the Supreme Court has not only declared pre-viability abortion prohibitions unconstitutional, but it has also subjected pre-viability abortion regulations to an "undue burden" test.³⁹ This test has been explained this way:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.⁴⁰

In contrast, after the point of fetal viability, the State's interest in protecting and preserving the (potential) life of the fetus becomes sufficiently powerful that, from this moment on, until the end of a pregnancy, it can justify broad State regulation of a woman's abortion choice⁴¹—even to the point of

³⁶ For thoughts on the abortion right as a sex equality right, see, for example, *Casey*, 505 U.S. at 887–98 (discussing spousal notification requirements and noting that "[w]omen do not lose their constitutionally protected liberty when they marry"); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1353–59 (2d ed. 1988); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1308–24 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 350–80 (1992); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 31–44 (1992).

³⁷ 505 U.S. 833 (1992).

³⁸ *Id.* at 846; see also *Gonzales v. Carhart*, 550 U.S. at 146 (assuming that "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 879 (plurality opinion))).

³⁹ *Casey*, 505 U.S. at 878 (plurality opinion); see also *Gonzales v. Carhart*, 550 U.S. at 146 (applying *Casey*'s "standard to the cases at bar"); *Stenberg v. Carhart*, 530 U.S. 914, 921, 945–46 (2000) (applying the "undue burden" test by a majority of the Court to find state abortion statute unconstitutional).

⁴⁰ *Casey*, 505 U.S. at 877 (plurality opinion).

⁴¹ See *id.* at 846 (majority opinion) (holding that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial

eliminating it altogether.⁴² Subject, that is, to one very important and sizeable exception: Even after viability, when the State may regulate and even ban abortion outright, it must, if it chooses to do so,⁴³ make express provision for abortion to be legal when necessary to protect or preserve the pregnant woman's life or her health.⁴⁴ The constitutionally required health exception has been found to be quite broad: Not only does it include threats to pregnant women's physical health, but it also includes threats to women's psychological well-being as well.⁴⁵

obstacle to the woman's effective right to elect the procedure," but that after viability, "the State's power to restrict abortions" becomes complete).

⁴² *Id.* (holding that the State may "restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health"); *id.* at 879 (plurality opinion) (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)); *Roe*, 410 U.S. at 163-65 (same); *see also* *Gonzales v. Carhart*, 550 U.S. at 161 ("The prohibition in the Act [being challenged] would be unconstitutional . . . if it subjected women to significant health risks." (alterations omitted) (citation omitted) (internal quotation marks omitted)).

⁴³ This is not constitutionally required. The State may—but need not—ban abortions after viability. *See, e.g., Casey*, 505 U.S. at 846 (confirming "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health"); *Roe*, 410 U.S. at 163-64 ("If the State is interested in protecting fetal life after viability, it *may* go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." (emphasis added)); *id.* at 164-65 (holding that "[f]or the stage subsequent to viability, the State in promoting its interest in the potentiality of human life *may, if it chooses*, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" (emphasis added)).

⁴⁴ *Casey*, 505 U.S. at 846; *Roe*, 410 U.S. at 163-65.

⁴⁵ *Gonzales v. Carhart*, 550 U.S. at 170 (Ginsburg, J., dissenting) ("[T]he *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect 'the health of the woman.'" (quoting *Casey*, 505 U.S. at 846)); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 327-28 (2006) ("[O]ur precedents hold . . . that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for the preservation of the life or health of the [woman]'" (quoting *Casey*, 505 U.S. at 879 (plurality opinion))); *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) ("Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation."); *Casey*, 505 U.S. at 882 (joint opinion of O'Connor, Kennedy & Souter, JJ.) ("Those [earlier abortion] decisions . . . recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. It cannot be questioned that psychological well-being is a facet of health." (citation omitted)); *see also* *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 768-69 (1986) (invalidating a *post*-viability abortion regulation for "fail[ure] to require that [a pregnant woman's] health be the physician's paramount consideration"); *Roe*, 410 U.S. at 153 ("Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is a problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are

Now, one may properly agree or disagree with these constitutional rules and the way they structure the abortion right. Few—on any side of the abortion issue—embrace them without qualification. But they are in any event the formal elements of the Supreme Court's current abortion jurisprudence by which the constitutionality of H.B. 125 must presently be judged. Doubters, if there are any, need not look beyond the U.S. Supreme Court's most recent major abortion case, *Gonzales v. Carhart*.⁴⁶ In it, some Justices widely known to disagree fervently with the constitutional arrangement *Roe v. Wade*⁴⁷ and its progeny have erected, and who believe this structure should be dismantled entirely,⁴⁸ affirmed the formal status of the existing constitutional rubric as it relates to abortion regulations.⁴⁹

B. An Application of the Existing Constitutional Rules

Having described the relevant constitutional rules, how does H.B. 125 stack up?

Begin with H.B. 125's criminal ban on abortion where a fetal heartbeat has been detected. By H.B. 125's own terms, the prohibition on performing abortions once a fetal heartbeat has been detected applies well before and also after the point of fetal viability.⁵⁰ For the purposes of analyzing the measure's

factors the woman and her responsible physician necessarily will consider in consultation."); *Doe v. Bolton*, 410 U.S. 179, 192 (1973) ("[T]he medical judgment may be exercised in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All of these factors may relate to health."). The scope of the health exception has been a source of controversy, in part on the grounds, as some commentators maintain, that it makes the right to abortion, all throughout a pregnancy, effectively a right to abortion on demand. See, e.g., Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 97 (2005) ("[N]o objective reader of *Carhart* could fail to conclude that *Roe* and *Doe* legalized abortion-on-demand from conception to birth for virtually any reason."); Jay Alan Sekulow & John Tuskey, *The "Center" Is in the Eye of the Beholder*, 40 N.Y.L. SCH. L. REV. 945 (1996) ("Given this infinitely expandable definition of 'health,' the truth of the matter about *Roe* is that something very much like the abortion-on-demand mandated for the first two trimesters persists until birth." (internal quotation marks omitted)). For additional discussion, see *infra* notes 141–56 and accompanying text.

⁴⁶ 550 U.S. 124 (2007).

⁴⁷ 410 U.S. 113 (1973).

⁴⁸ *Gonzales v. Carhart*, 550 U.S. at 169 (Thomas, J., concurring) (writing "separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution" (citation omitted)); *Casey*, 505 U.S. at 983 (Scalia, J., concurring in the judgment in part and dissenting in part) ("*Roe* was plainly wrong . . . and even more so (of course) if the proper criteria of text and tradition are applied.").

⁴⁹ See *Gonzales v. Carhart*, 550 U.S. at 146 (applying *Casey*'s standard); *id.* at 168–69 (Thomas, J., concurring) (noting that the majority accurately applied the Court's current jurisprudence, including *Casey*).

⁵⁰ See *Hearing on H.B. 125 Before the H. Health & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 1 (Ohio 2011) (statement of David Colombo, M.D.) (noting that the

constitutionality under existing Supreme Court precedents, however, it is the point of viability—not the point at which a fetal heartbeat is detectable or detected—that marks the constitutionally significant organizing line. Thus, it is necessary to divide H.B. 125's abortion ban up as the Supreme Court's abortion jurisprudence does or would, in terms of its pre-viability and post-viability operations. Each in turn.

1. *Pre-Viability Operation of House Bill 125's Abortion Ban After a Fetal Heartbeat Is Detected*

Operating pre-viability, H.B. 125, with its prohibition on any person, including any licensed physicians, from performing an abortion when a fetal heartbeat has been detected, is subject to the strictures of *Casey*, including its “undue burden” test. As *Casey* explained simply and straightforwardly, prior to fetal viability, “the State’s interests are not strong enough to support a prohibition of abortion,”⁵¹ hence, more directly, “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”⁵² Articulated in terms of *Casey*’s “undue burden” test, “a prohibition of abortion” is by definition an “imposition of a substantial obstacle to the woman’s effective right to elect the procedure,”⁵³ and as such, an undue burden on a woman’s pre-viability right to choose. Either way, H.B. 125’s pre-viability prohibition on abortions where a fetal heartbeat has been detected is thus unconstitutional. It fails to give the woman’s abortion right its constitutional due.

There should be no doubt about it, but in case there is, this crisp, categorical conclusion can be confirmed by digging into what the Supreme Court has said about the operation of *Casey*’s undue burden test. According to the joint opinion in *Casey*, if a pre-viability abortion regulation has the purpose or the effect of putting a substantial obstacle in the way of a woman’s abortion choice, it constitutes an undue burden.⁵⁴

fetal heartbeat “usually starts four weeks after conception” and that “multiple other critical embryological steps need to occur before viability is assured”); E-mail from David Colombo, M.D., to author (Feb. 22, 2013, 12:50 EST) (on file with author) (“The fetal heart beat starts at 6 to 8 weeks [into] gestation. ([N]ote: this is 4 to 6 weeks after conception takes place, the first two weeks occur after the period and before conception.)”); see also Catherine Candisky, *Heartbeat Bill Vote Today*, COLUMBUS DISPATCH, June 28, 2011, at B1 (noting that fetal heartbeats may ordinarily be detected from six to seven weeks into pregnancy).

⁵¹ *Casey*, 505 U.S. at 846.

⁵² *Id.* at 879 (plurality opinion); see also *Gonzales v. Carhart*, 550 U.S. at 146 (assuming that “[b]efore viability, a State ‘may not prohibit any woman from making the ultimate decision to terminate her pregnancy’” (quoting *Casey*, 505 U.S. at 879 (plurality opinion))).

⁵³ *Casey*, 505 U.S. at 846; see also *id.* at 878 (plurality opinion); *Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992).

⁵⁴ *Casey*, 505 U.S. at 877 (plurality opinion).

What of H.B. 125's purpose? Viewed in constitutional terms, the purpose of H.B. 125, evident from its statutory text, including findings in the preamble to the legislation,⁵⁵ is to vindicate the right to life by preventing abortions after a fetal heartbeat has been detected. In this sense, the design of the proposed legislation can properly be said to be to keep a certain (large) class of abortions from ever taking place. To carry out this objective, H.B. 125 purposefully places "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"⁵⁶: chiefly, a legal prohibition against post-heartbeat, but pre-viability abortions embodied in the measure's criminal law ban.⁵⁷ That this obstacle is meant to be substantial may be inferred from the consequence of its violation: a fifth degree felony carries with it a penalty of a maximum prison term of 12 months⁵⁸ and a fine of not more than \$2,500.⁵⁹ H.B. 125's criminal ban on pre-viability abortions where a fetal heartbeat has been detected thus constitutes an undue burden on a choice that, prior to viability, must ultimately be the pregnant woman's own.⁶⁰ In slightly different terms, but to the same practical legal effect, H.B. 125's criminal prohibition against post-heartbeat abortions is in no way a measure "calculated to inform the woman's free choice."⁶¹ It plainly means to "hinder it,"⁶² thus making it an unconstitutional restriction on a woman's pre-viability abortion decision.

The same result is reached by focusing on the would-be effect of H.B. 125, should the measure be enacted.⁶³ Were H.B. 125 to become law, the

⁵⁵ See H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(A)).

⁵⁶ *Casey*, 505 U.S. at 877 (plurality opinion); see also *Gonzales v. Carhart*, 550 U.S. at 156 (holding that a statute "would be unconstitutional 'if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability'" (quoting *Casey*, 505 U.S. at 878 (plurality opinion))).

⁵⁷ Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(5)) (creating the offense of "performing an abortion after the detection of a fetal heartbeat, a felony of the fifth degree"). Scarcely as an aside, the legal consequences of a conviction for such an offense might practically include professional sanctions against a physician. See OHIO REV. CODE ANN. § 4731.22(B)(10) (Supp. 2012) (requiring the state medical board to take disciplinary action against a certificate holder for the "[c]ommission of an act that constitutes a felony in this state"); see also *supra* note 19.

⁵⁸ OHIO REV. CODE ANN. § 2929.14(A)(5) (Supp. 2012).

⁵⁹ *Id.* § 2929.18(A)(3)(e).

⁶⁰ *Casey*, 505 U.S. at 846 (recognizing the "right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State"); see also *Gonzales v. Carhart*, 550 U.S. at 146 (assuming that "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 879 (plurality opinion))).

⁶¹ *Casey*, 505 U.S. at 877 (plurality opinion).

⁶² *Id.*

⁶³ Cf. *Stenberg v. Carhart*, 530 U.S. 914, 945–46 (2000) (holding that physicians performing abortions using the proscribed method "must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision.").

measure's criminal ban on abortions after a fetal heartbeat has been detected could reasonably be expected to have the effect of keeping "any person"⁶⁴ from providing a pregnant woman an abortion that she might seek. This, at least, if the law's sanctions had their predictable deterrent effect. If they did, H.B. 125 would serve to block pregnant women who are constitutionally entitled to end their pregnancies prior to viability for the reasons that they—not some third party or the State—choose, from doing so. H.B. 125 thus fails the undue burden test on multiple grounds.

This constitutional conclusion is unaffected by what a number of H.B. 125's proponents and supporters (and even some, if not all, of its pro-life dissenters) regard as its noble purposes: the protection and preservation of human life.⁶⁵ By constitutional lights, the purpose and effect of H.B. 125 are not measured by what may be in legislators' hearts or the intentions of their minds. Rather, they are ascertained with reference to the proposed legislation's text, presumably leavened with a common-sense understanding of how legal rules do (and can be predicted to) work in the ordinary course of events.

Nor, for that matter, does it make any constitutional difference that H.B. 125 declines to treat a pregnant woman who would seek or obtain an abortion that is otherwise illegal under the proposed statute's terms as a criminal or subject her to civil liability for her acts.⁶⁶ It is enough for constitutional purposes that H.B. 125 strips the pregnant woman of the choice

⁶⁴ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(1)) (providing "no person shall knowingly perform an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual that the pregnant woman is carrying and whose fetal heartbeat has been detected"); *see also id.* (to enact OHIO REV. CODE § 2919.19(C)(1)) (mandating that "no person shall perform an abortion on a pregnant woman prior to determining if the fetus the pregnant woman is carrying has a detectable fetal heartbeat"); *id.* (to enact OHIO REV. CODE § 2919.19(C)(2)) (requiring that "[a] person who intends to perform an abortion on a pregnant woman shall determine if there is the presence of a fetal heartbeat of the unborn human individual that the pregnant woman is carrying according to standard medical practice"); *id.* (to enact OHIO REV. CODE § 2919.19(D)(2)(a)) (requiring that "[t]he person intending to perform the abortion shall inform the pregnant woman in writing that the unborn human individual that the pregnant woman is carrying has a fetal heartbeat and shall inform the pregnant woman, to the best of the person's knowledge, of the statistical probability of bringing the unborn human individual to term based on the gestational age of the unborn human individual possessing a detectable fetal heartbeat").

⁶⁵ *See, e.g., Forte House Testimony*, *supra* note 2, at 1–2 (referring to other bills "that expand the rights of the vulnerable unborn," and then venturing that H.B. 125 "is the most valuable for protecting the lives of the unborn"); *Hearing on H.B. 125 Before the H. Health & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 1–2 (Ohio 2011) (statement of Michael S. Parker, M.D.) (basing support for the bill, *inter alia*, on "the protections provided to the silent unborn human individual").

⁶⁶ Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(G)).

whether to have an abortion by making the efforts of anyone who would help her—particularly, her physician—illegal.

It is conceivable that some might believe H.B. 125's health exception is a saving grace for the measure.⁶⁷ This exception, after all, suspends the law's operation in cases where an abortion is reasonably believed necessary in order to "prevent the death of a pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman."⁶⁸ Without missing the political significance of this exception, it does not provide a broad enough safe harbor to enable its pre-viability operation to survive constitutional review. This is because a pregnant woman's constitutionally protected right to choose an abortion prior to viability is not limited to those instances in which an abortion is, in a physician's professional judgment, required to preserve her life or health, however "health" may be defined.⁶⁹ Up to the point after viability when the State may generally prohibit abortions,⁷⁰ a woman seeking an abortion need not provide public reasons for her choice. Nor must she limit her reasons to protecting or preserving her own life. Or, for that matter, protecting or preserving her health.

Nor, finally, is the conclusion that H.B. 125 constitutes an unconstitutional restriction on pre-viability abortions altered by any of the legislative recitations found in the text of the bill.⁷¹ Crediting these unsourced data for the sake of argument,⁷² they may well be regarded as having great

⁶⁷ See *infra* notes 77–83 and accompanying text.

⁶⁸ Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)(a)).

⁶⁹ *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.' It also may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" (citation omitted) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878–89 (1992) (plurality opinion))); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) ("'[A] law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional." (quoting *Casey*, 505 U.S. at 877 (plurality opinion))); *Casey*, 505 U.S. at 846 ("First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.").

⁷⁰ See *supra* text accompanying notes 41–44.

⁷¹ Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(A)(1)–(6)) (announcing the findings of the General Assembly).

⁷² Some would not. See, e.g., *Opposition Testimony to HB 125: Hearing on H.B. 125 Before the H. Health & Aging Comm.*, 129th Gen. Assemb., Reg. Sess. 1 (Ohio 2011) (statement of Al Gerhardstein, Attorney at Gerhardstein & Branch) (describing H.B. 125's findings as having "no basis in reality" and noting that they come "[w]ithout any citation to medical authorities," and further suggesting that these "selective and undocumented 'findings'" bear no relationship "to the state's interest in promoting maternal health" and do

moral or social or personal significance. The correlation found in H.B. 125's recitations between the existence of a fetal heartbeat, on the one hand, and fetal development to viability and to live birth, on the other, may be taken to matter for some, maybe many, greatly. Still, a correlation (even a high correlation) between two different biological events (whether between the presence of a fetal heartbeat and fetal viability or between a heartbeat and live birth) does not and cannot make the events the same thing. Accordingly, even if one accepts that the presence of a fetal heartbeat is correlated to fetal viability or live birth, or both, that is not enough to say that H.B. 125 tracks, hence respects, viability as the constitutionally significant dividing line that it presently is, meaning: the point before which it is the pregnant woman herself, and not the State, who must be allowed to make the ultimate decision whether an abortion shall be performed. While the text of H.B. 125 may seem to bow in the direction of the constitutional significance of the moment of viability, in actuality, it seeks to displace it in favor of the moment when a fetal heartbeat can be (and is) discerned. That moment under H.B. 125, the moment when a fetal heartbeat can be and is heard, is to be the new moment of viability, when the State's authority to regulate abortion to the point of banning it outright (or subject to an exception for a pregnant woman's life or some dangers to her health) becomes constitutionally acceptable.⁷³

not "justify the intrusion by the state into the first trimester relationship between the physician and her patient").

⁷³ The substitution of the viability line for a heartbeat rule seems more like a strategic, as opposed to a constitutionally principled or even a constitutionally relevant, choice. What reason is there, after all, to prefer a heartbeat rule to one that would ban abortion from the moment of conception? Over forty years ago, John T. Noonan, Jr., one of the most vocal and eloquent opponents of abortion rights inside the legal academy, noted that "such studies as have been made" show that once "the conceptus is formed . . . roughly in only 20 percent of the cases will spontaneous abortion occur. In other words, the chances are about 4 out of 5 that this new being will develop." John T. Noonan, Jr., *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 1, 55-56 (John T. Noonan, Jr., ed. 1970) (footnote omitted). If that is right, why not abandon H.B. 125's heartbeat rule for a rule grounded in conception? If one believes that conception defines humanity or personhood, would more lives not be saved?

Of course, the shift from viability to heartbeat may seem to be a smaller step than the one from viability to conception. And it may be that incremental changes are easier for lawmakers—including legislators, who are politically answerable—to abide by than larger, more dramatic leaps. As a constitutional matter, however, it must be understood that the incremental shift contemplated by H.B. 125—from viability to heartbeat—is a direct attack on what the controlling opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* deemed "the most central principle" of *Roe v. Wade*: the principle that viability is the vital constitutional dividing line between those moments before, when the final decision about whether an abortion will be performed rests in the pregnant woman's hands, and the moments after, when it is in most respects ultimately up to the State to decide who decides. *Casey*, 505 U.S. at 846; see also *id.* at 870-71 (plurality opinion) (concluding that the constitutional "line should be drawn at viability" and affirming a "woman's right to terminate her pregnancy before viability" as the "most central principle of *Roe*"). Stated slightly differently, H.B. 125's heartbeat rule would require the repudiation of the Court's

This is not merely a matter of perspective. Nor is it simply the product of an underlying normative perspective on women's reproductive choice. Though he did not say so expressly, it seems significant that Professor David Forte, a careful student of the constitutionality of this measure, in his testimony before the Ohio House of Representatives Health and Aging Committee, and his testimony before the Ohio Senate Health, Human Services, and Aging Committee, nowhere expressed the view that H.B. 125 in its entirety is a constitutional piece of legislation.⁷⁴ Indeed, read closely, the testimony he offered, if not on the surface then between the lines, effectively concedes that it is not.⁷⁵ If so, it would certainly help to explain the main thrust of his testimony, which urged the utility of H.B. 125 precisely as a vehicle for precipitating a modification to existing constitutional doctrine.⁷⁶ Recognizing instances when the opposite might hold true, one might ordinarily think that if H.B. 125 were already comfortably authorized by existing doctrine, it might not be ideally suited for the purposes of triggering doctrinal change.

Having come this far, a fair question to ask is: What is to be made of the view of H.B. 125 found in the written testimony provided to the Ohio House Health and Aging Committee by Mr. Walter Weber, Senior Litigation Counsel of the American Center for Law and Justice?⁷⁷ That testimony suggested that H.B. 125, including what it deemed "the prohibition section of the Heartbeat Bill,"⁷⁸ is permissible under the U.S. Constitution. More specifically, after citing the companion case to *Roe v. Wade*, a case called *Doe v. Bolton*,⁷⁹ which relied in part, it explained, on an earlier case called *United States v. Vuitch*,⁸⁰ Weber's testimony proposed that "[u]nder this precedent, the prohibition section of the Heartbeat Bill, which has an exception for 'life or

viability line every bit as much as a rule banning abortions from the moment of conception would. Whether one regards this as a good idea or not, the point it is meant to underscore is that H.B. 125's pre-viability abortion ban where a fetal heartbeat has been detected can no more be squared with the Supreme Court's abortion jurisprudence than a flat ban on abortion from conception could be.

⁷⁴ See *Forte Senate Testimony*, *supra* note 2, at 1–6; *Forte House Testimony*, *supra* note 2, at 1–4.

⁷⁵ See *Forte Senate Testimony*, *supra* note 2, at 3 ("Yet, as we know, some object to the bill, not on substantive grounds, but merely as a tactical matter. . . . Instead of taking legislative and legal action now, they ask us . . . to wait until there's a new Supreme Court"); *Forte House Testimony*, *supra* note 2, at 2 ("Now, some say that we should not pass a bill that a court might disallow [S]uch a stand-pat strategy flies in the face of history. Courts never change their minds unless they are invited to."); see also *Strang Senate Testimony*, *supra* note 2, at 6 ("A complete pre-viability prohibition on abortion, like that contained in [H.B. 125], constitutes an undue burden, and is therefore unconstitutional under *Casey*. I do not read Professor Forte's comments to disagree." (footnote omitted)).

⁷⁶ See *Forte House Testimony*, *supra* note 2, at 2 (urging a legislative strategy that invites the Supreme Court to change course on constitutional abortion rights).

⁷⁷ *Weber House Testimony*, *supra* note 2, at 1.

⁷⁸ *Id.* at 2.

⁷⁹ 410 U.S. 179, 191–92 (1973).

⁸⁰ 402 U.S. 62, 71–72 (1971).

health,' is constitutionally defensible under current Supreme Court precedent."⁸¹

Now, there is something to this conclusion—or at least there was, given the version of H.B. 125 originally introduced in the Ohio House of Representatives, which Weber was commenting on.⁸² That original measure contained a health exception suspending the operation of the proposed legislation's criminal ban when necessary to protect and preserve the pregnant woman's life or health.⁸³ With that version of H.B. 125 in mind, it is at least understandable why Weber took the position he did. The legislation's original exception for the protection and preservation of the pregnant woman's life and health rendered the prohibition section of H.B. 125 a constitutional exercise of State authority under existing constitutional rules. But this was only true—and, one surmises, this is the unarticulated context of Weber's testimony—after the point of fetal viability. After fetal viability, though not before, according to the Supreme Court's abortion jurisprudence, the State may regulate and prohibit abortion except where necessary to protect and preserve a pregnant woman's life and health. Insofar as Weber was talking about H.B. 125's post-viability application, then, what he said was right: H.B. 125, which initially stopped short of asserting all of the State's post-viability authority to prohibit abortions, generally only barring abortions after a fetal heartbeat existed and was detected, appeared to contain a constitutionally permissible post-viability abortion ban. It was constitutionally permissible both because it did not generally outlaw all post-viability abortions, and because it contained a broad exception to its rule in cases in which an abortion was needed to protect or preserve a woman's life or health. As will be explained more in a moment, however, the alteration to H.B. 125 narrowing the scope of the bill's health exception makes Weber's description no longer accurate, as it once was, as to H.B. 125's post-viability application, or its constitutionality by extension.

But even when H.B. 125 contained a broader exception to protect and preserve pregnant women's lives and health, it did not follow that just because the proposed law's post-viability abortion ban might have been—or was—a valid exercise of State authority that it was also a constitutionally legitimate exercise of State authority before viability. The same law—as with H.B. 125—can be unconstitutional with respect to some of its operations without being unconstitutional as to them all.

To summarize to this point: As for H.B. 125's abortion ban where a fetal heartbeat has been detected, it is unconstitutional prior to fetal viability, because as a rule it prohibits a pregnant woman from exercising her constitutionally guaranteed choice.

⁸¹ *Weber House Testimony*, *supra* note 2, at 2.

⁸² See generally H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (as introduced, Feb. 24, 2011).

⁸³ *Id.* (to enact OHIO REV. CODE § 2919.19(E)(2)) (providing an exception "to preserve the life or health of the pregnant woman").

2. *Post-Viability Operation of House Bill 125's Abortion Ban After a Fetal Heartbeat Is Detected*

But what about after the point of viability? Is H.B. 125 constitutional as a post-viability abortion ban? The answer is in a sense yes and in a sense no. First, some discussion of H.B. 125's abortion ban and its related health exception, and then, second, some discussion of H.B. 125's disclosure and acknowledgment rule.

a. *House Bill 125's Abortion Ban and Its Health Exception*

Starting with yes: On the one hand, there is H.B. 125's ban on abortions after a heartbeat is detected. Operating after the point of fetal viability, for its own part, and consistent with existing constitutional rules, it presently raises no real constitutional doubts. This is because after the point of viability, the State in pursuit of its interest in protecting and preserving the (potential) life of the fetus may go as far as outlawing all abortions, subject to an exception designed to protect and preserve the pregnant woman's life and health.⁸⁴ Because H.B. 125 only bars abortions where a fetal heartbeat has been detected, it may be thought not to occupy the full terrain available to the State at this point in the course of a woman's pregnancy. It does not simply ban all post-viability abortions, but only those where a fetal heartbeat has been detected, and not even those when its health exception applies.⁸⁵ At the same time, practically, H.B. 125 may be thought to have the general effect of stopping most, if not all post-viability abortions. It will, anyway, where it applies, assuming reasonable medical practice is able to and does detect a heartbeat after the point of viability, which it ordinarily should.

But if H.B. 125's broad ban on post-viability abortions itself is not problematic, this does not mean it contains no post-viability constitutional flaws. And there are very serious problems in this regard with H.B. 125's health exception. The language that originally was a (or the) key to H.B. 125's constitutionality post-viability⁸⁶—specifically, its initial exception permitting

⁸⁴ *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion); *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

⁸⁵ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(1)–(2)).

⁸⁶ As Justice Ginsburg recently described it: "In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health." *Gonzales v. Carhart*, 550 U.S. at 172 (Ginsburg, J., dissenting). As support for this conclusion, Justice Ginsburg drew on the Court's earlier decision in *Ayotte v. Planned Parenthood of Northern New England*, which itself explained: "[O]ur precedents hold, that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for the preservation of the life or health of the [woman].'" 546 U.S. 320, 327 (2006) (quoting *Casey*, 505 U.S. at 879 (plurality opinion)).

abortions when necessary to “preserve the life or health of the pregnant woman”⁸⁷—has long since been removed.⁸⁸ In its place now stands a provision that, in its entirety, reads:

A person is not in violation of division (E)(1) of this section [banning the knowing performance of post-heartbeat abortions] if that person performs a medical procedure designed to or intended, in that person’s reasonable medical judgment, to prevent the death of a pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.⁸⁹

This textual substitution is an amendment to H.B. 125 with a notable constitutional difference. The bill’s revision is not just another way of stating what its original language did. Women’s health as such no longer supplies a *per se*, general exception to H.B. 125’s otherwise sweeping ban on post-heartbeat abortions, as was initially the case.⁹⁰ The version of H.B. 125 that passed the Ohio House of Representatives thus changes the bill’s original meaning and substantially narrows the scope of its health-related exception to a limited range of cases involving only specified kinds of dangers to pregnant women’s health.⁹¹

⁸⁷ Ohio H.B. 125 (as introduced, Feb. 24, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)). The full text of this exception provided: “A person is not in violation of division (E)(1) of this section if that person performs a medical procedure designed to or intended to prevent the death of a pregnant woman or, in that person’s reasonable medical judgment, to preserve the life or health of the pregnant woman.” *Id.*

⁸⁸ See LISA MUSIELEWICZ, OHIO LEGIS. SERV. COMM’N, BILL ANALYSIS OF AM. SUB. H.B. 125, 129th Gen. Assemb., Reg. Sess., at 5 (2011).

⁸⁹ Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)(a)).

⁹⁰ Compare *id.* (granting an exception to “prevent the death of a pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function”), with Ohio H.B. 125 (as introduced, Feb. 24, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)) (granting an exception “to preserve the life or health of the pregnant woman”).

⁹¹ This point might seem too obvious to warrant mention, but in context, it cannot be overlooked. A number of years ago, in *Casey*, a federal appeals court had before it language from a Pennsylvania statute that sounded very much like the language now contained in H.B. 125. Under the Pennsylvania law at issue in that case, otherwise illegal abortions were permitted in certain cases of “medical emergency.” 18 PA. CONS. STAT. § 3203 (1990), quoted in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 902 (1992) (appendix to joint opinion). “Medical emergency” was statutorily defined as:

That condition which, on the basis of the physician’s good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

Id. Rather than reading this “emergency” provision as its plain text might have suggested, the federal court of appeals interpreted it consistent with its understanding of the intentions

What are they? Affirmatively, to review the relevant language again, H.B. 125's health-related exception, which applies after a fetal heartbeat has been detected, narrowly permits "a medical procedure designed to or intended, in that person's reasonable medical judgment, to prevent the death of a pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman."⁹² That is all.

By negative implication, it appears that a post-heartbeat procedure designed or intended to prevent a small or moderate, but not a serious, risk of substantial and irreversible harm to a pregnant woman, remains outlawed. So, too, does a post-heartbeat procedure reasonably believed necessary to prevent a serious risk of a substantial but not irreversible impairment of a major bodily function of a pregnant woman. Indeed, procedures needed to prevent nontrivial, but not quite substantial and irreversible impairments of major bodily functions, as well as procedures needed to prevent substantial and irreversible impairments of non-major bodily functions, are all impermissible under H.B. 125's terms. The same holds true for those post-heartbeat procedures needed to avoid or mitigate other sorts of serious risks to women's health, including mental health, that can follow from pregnancy itself.⁹³

Taken individually, but especially together, these exclusions from H.B. 125's current health-related exception show that the legislation's criminal abortion ban, if enacted, would force pregnant women to confront a number of significant health risks both before viability and after. These are health risks that, in its initial version, H.B. 125 did not impose. But they are, in any event, and more significantly for present purposes, risks that existing constitutional

of the Pennsylvania legislature that enacted it. As the court said: "[W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 701 (3d Cir. 1991). With the stroke of a pen, an emergency exception that permitted abortions only to prevent death or a "serious risk of substantial and irreversible impairment of [a] major bodily function," 18 PA. CONS. STAT. § 3203 (1990), became a statutory authorization for abortions whenever there was "a significant threat to the life or health of a woman." *Casey*, 947 F.2d at 701. Whatever the merits in *Casey* of stretching that statutory language that way—and that far—and the interpretation was one that the Supreme Court chose to follow, *see Casey*, 505 U.S. at 879–80 (plurality opinion), a similar reading of H.B. 125's language seems implausible. Given the amendment to the bill's original text, H.B. 125's language cannot plausibly be rewritten to state a general health exception. After all, if that is what the amendment to H.B. 125 meant to achieve, there would have been no point in modifying the bill's language. Thus, to do to the language of H.B. 125 what the appellate court in *Casey* did to the medical emergency provision of the Pennsylvania law at issue there would be to ascribe to the Ohio legislature an irrational intent: going through the process of amending H.B. 125 wholly for naught. Thanks to Richard Muniz for reminding me of the parallels between the language in H.B. 125 and the medical emergency provision in *Casey*.

⁹² Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)(a)).

⁹³ *See* LISA MUSIELEWICZ, OHIO LEGIS. SERV. COMM'N, BILL ANALYSIS OF AM. SUB. H.B. 125, 129th Gen. Assemb., Reg. Sess., at 5, 10–11 (2011); *see also supra* note 23.

precedents protect women from having to endure against their will—both before fetal viability and after.⁹⁴ Hence the conclusion: Given that existing abortion rules require the State not to bar abortions after viability where doing so imperils a pregnant woman's life or health, health being much more broadly defined as a constitutional proposition than "a serious risk of the substantial and irreversible impairment of a major bodily function," the limited health exception in the current version of H.B. 125 is too limited to save the bill.

b. House Bill 125's Disclosure and Acknowledgment Rule

This still leaves the constitutionality of H.B. 125's disclosure and acknowledgment rule to consider. May the State, in the context of H.B. 125's ban on post-heartbeat abortions, broadly require testing for the presence of a fetal heartbeat before any abortion is performed and, if a heartbeat is heard, require a physician intending to perform an abortion to disclose that information to a pregnant woman, along with information about the likelihood that the fetus will develop to viability, then term? May the State at the same time require a pregnant woman to acknowledge receipt of the information the law generally prescribes?⁹⁵

Some testimony on H.B. 125's constitutionality maintained the bill's disclosure and acknowledgment rule is a proper exercise of State authority.⁹⁶ Describing the rule as an "informed consent" measure, Professor Lee Strang, for instance, urged in testimony to the Ohio Senate Health, Human Services, and Aging Committee that H.B. 125's "informed consent requirement is constitutional both pre- and post-viability."⁹⁷ Referring to *Casey*'s "undue burden" test, Strang maintained that, "[p]re-viability, H.B. 125's informed consent requirement has the purpose and effect of helping mothers make well-informed decisions whether or not to abort their children."⁹⁸ As for the

⁹⁴ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) ("The [abortion] prohibition [involved in the case] would be unconstitutional . . . if it 'subject[ed] [women] to significant health risks.'" (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 327–28 (2006))); *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) ("[T]he law requires a health exception in order to validate even a postviability abortion regulation . . .").

⁹⁵ See Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(D)(2)(b)).

⁹⁶ See *infra* text accompanying notes 97–106; see also *Weber Senate Testimony*, *supra* note 7, at 1 (noting the "informed consent" provisions are constitutional); *Bopp Senate Testimony*, *supra* note 2, at 6–8 (explaining why the "informed consent" provisions of H.B. 125 are constitutional); accord *Forte Senate Testimony*, *supra* note 2, at 5 (describing H.B. 125's disclosure and acknowledgment rule in the register of an informed consent provision).

⁹⁷ *Strang Senate Testimony*, *supra* note 2, at 3.

⁹⁸ *Id.*; accord *Bopp Senate Testimony*, *supra* note 2, at 7 (describing H.B. 125's "informed consent" rule as a "now-familiar, women's right-to-know law[] that ha[s] been passed and upheld as part of the informed-consent dialogue between a woman and an abortionist"); *Forte Senate Testimony*, *supra* note 2, at 5 ("The testing and informed consent

measure's purpose, he proposed that H.B. 125 ensures pregnant women's abortion decisions are "mature and informed"⁹⁹ by "giving mothers information pertinent to the abortion decision."¹⁰⁰ This information includes the information that a fetal heartbeat has been detected, information that is material to "many Americans" for whom "the licitness of abortion is tied to a child's stage of development," and information, "not common knowledge," about the relationship between the detection of a fetal heartbeat and "the likelihood that the child will come to term."¹⁰¹ Similarly, to the measure's would-be effect, Strang ventured that it would impose no "undue burden on mothers contemplating abortion because it is not a 'substantial obstacle' to 'a large fraction of the cases in which [the informed consent requirement] is relevant.'"¹⁰² This is because this requirement "simply adds more information."¹⁰³ "And, as the Supreme Court [has] made clear, 'the State[] . . . may take measures to ensure that the woman's choice is informed.'"¹⁰⁴ Rounding out the conclusion that, pre-viability, H.B. 125's "informed consent" requirement is constitutional, Strang observed:

This conclusion is bolstered by H.B. 125's "[m]edical emergency" exception. The exception excuses the informed consent requirement if a physician, in good faith, determines that the "life" or a "major bodily function of the pregnant woman" necessitates an abortion. Therefore, the already small category of women for whom the informed consent provision constitutes an "undue burden" is made even smaller because some of them may procure an abortion without informed consent.¹⁰⁵

This being so, Strang said it follows that, since "post-viability state regulations [of abortion] are subject to less scrutiny, H.B. 125's informed consent requirement is also constitutional post-viability."¹⁰⁶ *Q.E.D.*

Straightforward in its way, Strang's testimony may initially seem somewhat perplexing. The disclosure and acknowledgment rule, whether called that or an informed consent provision, "has the purpose and effect of

provisions themselves should have a significant effect. When a woman is informed of the very high chances that this living human being within her will be carried safely through pregnancy to birth, it must surely help her to make a more considered judgment of what she shall do.").

⁹⁹ *Strang Senate Testimony*, *supra* note 2, at 3 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.)) (internal quotation marks omitted).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 4 (alteration in original) (quoting *Casey*, 505 U.S. at 895 (majority opinion)).

¹⁰³ *Id.* Gesturing toward the 24-hour waiting period H.B. 125 contemplates, Strang additionally remarked, it "does not add any appreciable time commitment." *Id.*

¹⁰⁴ *Strang Senate Testimony*, *supra* note 2, at 4 (alteration in original) (quoting *Casey*, 505 U.S. at 878 (plurality opinion)).

¹⁰⁵ *Id.* (footnote omitted).

¹⁰⁶ *Id.* at 5.

helping mothers make well-informed decisions whether or not to abort their children"?¹⁰⁷ Strang's description and statutory exceptions aside, by H.B. 125's terms, once a fetal heartbeat has been detected, a pregnant woman as a general rule has no choice about whether or not to terminate a pregnancy. H.B. 125 makes the decision for her by outlawing abortions after a fetal heartbeat is heard. If so, under those circumstances, how can H.B. 125's disclosure and acknowledgment rule have either the purpose or the effect of informing pregnant women's choices? What choices does it generally inform?

One way to understand Strang's testimony is to imagine it imagines H.B. 125's disclosure and acknowledgment rule hypothetically, as though a stand-alone informed consent measure, not combined with H.B. 125's post-heartbeat abortion ban. Why think this way? H.B. 125 contains severability language providing that, even if some of the bill's provisions are beyond the constitutional pale, those that are not, but remain, are to retain their full legal effect.¹⁰⁸ Not coincidentally, Strang's testimony affirmed H.B. 125's post-heartbeat abortion ban is unconstitutional in important respects.¹⁰⁹ The unstated context for Strang's analysis of H.B. 125's disclosure and acknowledgment rule, then, may be that it is written figuring the bill's ban on post-heartbeat abortions—at least prior to viability—will be constitutionally eliminated. If so, Strang's analysis may tacitly assume, if it does not expressly and unambiguously declare, that the constitutionality of H.B. 125's disclosure and acknowledgment rule will ultimately turn on its legitimacy as a stand-alone informed consent measure. Seen that way, it is possible to understand why Strang's analysis frames the disclosure and acknowledgment rule as an informed consent measure and why it thus maintains that the rule is constitutional.

But to understand an argument is not necessarily to agree with it. And there is reason to think it a mistake to characterize the disclosure and

¹⁰⁷ *Id.* at 3.

¹⁰⁸ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(K)) (severability provision). A number of commentators describing the disclosure and acknowledgment provision as a constitutionally permissible informed consent rule mention H.B. 125's severability provision. *See, e.g., Porter Senate Testimony, supra* note 7, at 3 ("Ohio Right to Life gets exactly what they want—informed consent only with this bill. You see, the severability will allow the courts to uphold what everyone agrees will likely be upheld even by the lower courts: informed consent, testing for the baby's heartbeat, and reporting requirements."); *Forte Senate Testimony, supra* note 2, at 5; *see also Weber Senate Testimony, supra* note 7, at 2.

¹⁰⁹ *Strang Senate Testimony, supra* note 2, at 6. Strang's testimony advances the position that H.B. 125's health exception satisfies existing abortion rules: "The constitutionality of the post-viability ban depends on the scope of that exception. If it meets *Casey*'s requirement, then it passes constitutional muster. I believe it does because H.B. 125's exception uses language analogous to that upheld in *Casey* and the numerous other statutes upheld by federal courts." *Id.* (footnotes omitted).

acknowledgment rule as a measure of informed consent that basically respects women's reproductive choices. Analyzing H.B. 125's disclosure and acknowledgment rule the way Strang's testimony does, as a stand-alone informed consent measure, does not capture, hence convey, its actual textual purpose and likely practical effect, both of which must be assessed by considering the entirety of H.B. 125's text.

Read organically in the context of H.B. 125—the context in which it is actually situated—the disclosure and acknowledgment rule constitutes an undue burden on a pregnant woman's constitutional right to choose to terminate an unwanted pregnancy prior to fetal viability. It cannot be saved as a mere information-providing rule that helps pregnant women make well-informed or more well-informed abortion decisions.¹¹⁰

To see why, it is useful to bracket the legitimacy of the rule's waiting period and the costs it could impose on pregnant women contemplating abortions,¹¹¹ as well as special constitutional concerns that might arise from

¹¹⁰ See *id.* at 3.

¹¹¹ If not necessarily for that reason unconstitutional. On the waiting period, consider *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881–87 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.). A number of lower court decisions since *Casey* have rejected challenges to other waiting periods. See, e.g., *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 363–64 (6th Cir. 2006) (upholding a provision requiring women seeking an abortion to attend, for informed consent purposes, an in-person meeting with a physician at least twenty-four hours prior to receiving the abortion); *A Woman's Choice—East Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002) (noting that no court other than the district court had invalidated a law similar to *Casey*); *Karlin v. Foust*, 188 F.3d 446, 488 (7th Cir. 1999); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir. 1994); *Barnes v. Moore*, 970 F.2d 12, 13 (5th Cir. 1992); *Tucson Women's Ctr. v. Ariz. Med. Bd.*, 666 F. Supp. 2d 1091, 1094 (D. Ariz. 2009); *Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 456 (W.D. Ky. 2000); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F. Supp. 1409, 1417 (D.S.D. 1994), *aff'd*, 63 F.3d 1452 (8th Cir. 1995); *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1491 (D. Utah 1994), *rev'd in part and appeal dismissed in part*, 72 F.3d 139 (10th Cir. 1995). Further, compare the language of Ohio H.B. 125 (to enact OHIO REV. CODE § 2919.19(D)), which reads as follows:

(D)(1) Division (D) of this section applies to all abortions that are not prohibited under sections 2919.12, 2919.121, and 2919.151 of the Revised Code, except when a medical emergency exists that prevents compliance with this division.

(2) If the person who intends to perform an abortion on a pregnant woman detects a fetal heartbeat in the unborn human individual that the pregnant woman is carrying, no later than twenty-four hours prior to the performance of the intended abortion . . .

(a) The person intending to perform the abortion shall inform the pregnant woman

with the Pennsylvania statute at issue in *Casey*, which reads as follows:

§ 3205. Informed consent.

(a) General rule.—No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

requiring certain fetal-heartbeat-detecting procedures the law might allow.¹¹² Focusing directly on the disclosure and acknowledgment provisions themselves, H.B. 125 requires a doctor who intends to perform an abortion to check for a fetal heartbeat and to inform his patient about its presence where one is detected and to inform her of “certain specified information regarding the statistical probability of bringing” that fetus to viability, then term.¹¹³ A pregnant woman who has received this information must, in turn, acknowledge it.¹¹⁴ What follows next is not that a pregnant woman is allowed to take that information into account and decide for herself whether to terminate her pregnancy. A fetal heartbeat having been detected, H.B. 125’s post-heartbeat abortion ban kicks in. After a pregnant woman receives the information H.B. 125 requires that she receive, and even after she formally acknowledges it as the proposed law provides,¹¹⁵ she is not legally entitled to decide whether to proceed with an abortion. H.B. 125 makes that decision for her.¹¹⁶ It says she cannot have an

(1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of: . . .

Casey, 505 U.S. at 902 (appendix to joint opinion) (quoting 18 PA. CONS. STAT. § 3205 (1990)).

On the permissibility of imposing additional costs on pregnant women, compare *Casey*, 505 U.S. at 881, 887 (joint opinion of O’Connor, Kennedy & Souter, JJ.) (upholding Pennsylvania statute requiring a twenty-four hour waiting period after a pregnant woman is informed of “the nature of the procedure, the health risks of the abortion and of childbirth, and the ‘probable gestational age of the unborn child’” (quoting 18 PA. CONS. STAT. § 3205 (1990))), with *id.* at 887, 898 (majority opinion) (striking down as an undue burden a requirement that a pregnant woman present a signed statement indicating that she has “notified her spouse that she is about to undergo an abortion”).

¹¹² See *supra* note 30. Additionally, some may believe there is a live constitutional question about the authority of the State to put words in physicians’ mouths, but First Amendment challenges may be, for the time being, settled. See *Casey*, 505 U.S. at 884 (joint opinion of O’Connor, Kennedy & Souter, JJ.) (rejecting First Amendment challenge to Pennsylvania’s requirement that physicians provide information about the risks of abortion because “as part of the practice of medicine,” physicians are “subject to reasonable licensing and regulation by the State”); *Rust v. Sullivan*, 500 U.S. 173, 192 (1991) (rejecting physicians’ First Amendment challenges to federal prohibitions on abortion counseling, referral, and the provision of information regarding abortion as a method of family planning). But see *id.* at 198 (noting that Congress had not denied physicians the right to engage in abortion-related speech; Congress merely opted not to fund that activity).

¹¹³ See LISA MUSIELEWICZ, OHIO LEGIS. SERV. COMM’N, BILL ANALYSIS OF AM. SUB. H.B. 125, 129th Gen. Assemb., Reg. Sess., at 2 (2011); see also Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(D)(2)(a)) (requiring the physician to inform the pregnant woman of the fetal heartbeat and “the statistical probability of bringing the unborn human individual to term based on the gestational age”).

¹¹⁴ Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(D)(2)(b)) (requiring the pregnant woman to “sign a form acknowledging that the pregnant woman has received [the] information”).

¹¹⁵ *Id.*

¹¹⁶ Seen in this light, H.B. 125’s disclosure and acknowledgment rule does not operate the way informed consent provisions ordinarily do: requiring the disclosure of material

abortion unless it is "designed to or intended, in . . . reasonable medical judgment, to prevent [her] . . . death . . . or to prevent [her from suffering] a serious risk of the substantial and irreversible impairment of a major bodily function."¹¹⁷

While this may leave open some room for a pregnant woman to exercise informed consent in very specific and limited circumstances, she may not do so where, in her doctor's judgment, her life or health—narrowly defined as H.B. 125 defines it—is not at stake. In this sense, H.B. 125's disclosure and acknowledgment rule, as a rule, does not and thus cannot be said to seek to inform a pregnant woman's pre-viability abortion decision. It is not a rule that is basically designed to enhance what is otherwise constitutionally required to be a "woman's free choice."¹¹⁸ Rather, the disclosure and acknowledgement rule, both in terms of its purpose and its intended effect, as seen in light of the entirety of H.B. 125, aims in other directions: toward constraining or foreclosing a woman's free choice. It requires disclosure and acknowledgment of information as a precursor to taking the decision about what to do with that information away from the pregnant woman. This is not consistent with the existing constitutional requirements holding that the ultimate decision about a pre-viability abortion must be left in a pregnant woman's hands.

H.B. 125's disclosure and acknowledgment rule is thus not a measure that either is designed to make consent for an abortion procedure informed or more well-informed or, perhaps just as importantly, that can reasonably be described in those terms. Textually woven into, hence tied to, this proposed legislation, with its criminal prohibition on all post-fetal heartbeat abortions, including those that take place prior to fetal viability, H.B. 125's disclosure and acknowledgment rule is suffused with, and tainted by, H.B. 125's larger constitutional defects. It is an effort that, in purpose and effect, does not seek to inform or enrich a woman's constitutionally protected choice, but to "hinder"¹¹⁹ it. This flaw is baked into H.B. 125's disclosure and acknowledgment rule, and thus remains—it is not eliminated or cured—by removing the remainder of H.B. 125's abortion ban. To strip away H.B. 125's abortion ban while leaving its disclosure and acknowledgment rule in place does not change what is in the rule's textual DNA, so to speak. If what the legislature really intends is an informed consent provision operating the way that Strang describes H.B. 125's disclosure and acknowledgment rule,

information a reasonable person would want to have when deciding entirely for herself what particular medical decision she will make. *See* BARRY R. FURROW ET AL., *HEALTH LAW* 314–15 (2d ed. 2000) (discussing the reasonable patient standard of informed consent).

¹¹⁷ Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)(a)).

¹¹⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion).

¹¹⁹ *Id.*

it will have to go back to the drawing board and start drafting anew.¹²⁰ But any such law, as an informed consent measure, must allow a real measure of consent after ensuring a health care decision is informed.

To be clear, the point being made here is that H.B. 125's disclosure and acknowledgement rule is unconstitutional prior to viability. But while this rule—pre-viability—is an unconstitutional limitation on a pregnant woman's right to choose, its post-viability application does not raise precisely the same concerns. Post-viability, even coupled with H.B. 125's ban on abortions after a fetal heartbeat has been detected, the measure might well be thought of as a constitutionally acceptable exercise of the State's authority, consistent with the Supreme Court's existing abortion jurisprudence.¹²¹ There is an *a fortiori* argument here, though not exactly the one in Strang's Ohio Senate testimony: If the State, consistent with the Supreme Court's abortion precedents, may ban abortion outright post-viability, it might be thought, *a fortiori*, to have the power to require a doctor intending to perform an abortion to test for a fetal heartbeat and to disclose information about that heartbeat and its meaning for bringing the fetus to term to the pregnant woman. It might likewise be thought that if the State has the authority to block a pregnant woman's decision about abortion, it has the authority short of that to require her to acknowledge receiving information about her fetus and its condition and its prospects of being carried to term. All this, anyway, so long as the disclosure and acknowledgment rule does not in any way require a pregnant woman to run risks to her life or her health that the Constitution does not allow the State to impose.

While this line of reasoning may be articulated and hold up comfortably within existing constitutional abortion rules, it is also missing something. Without more, it does not seem to fully grasp, much less grapple with, the potentially excessive, even gratuitous, dimensions of H.B. 125's disclosure and acknowledgment rule when it is joined with the bill's post-fetal heartbeat abortion ban. Seen that way, what purpose does the disclosure and acknowledgement rule actually serve? If the State means to exercise its authority to ban post-viability abortions where a fetal heartbeat has been detected, why

¹²⁰ See Letter from Marshal M. Pitchford to Lynn Wachtmann, *supra* note 3, at 3 (“ORTL [Ohio Right to Life] does have an amendment that would remedy in large part the constitutional flaws in the Heartbeat Bill but would still keep intact its educational and deterrence components. *ORTL could support the Heartbeat Bill if it were an Informed Consent Heartbeat Bill only.*”); see also Gonidakis Senate Testimony, *supra* note 5, at 2 (expressing Ohio Right to Life's support for a stand-alone informed consent measure); Pitchford Senate Testimony, *supra* note 3, at 1–2 (same); cf. Interested Party Testimony on Substitute HB 125: Hearing on H.B. 125 Before the S. Health, Human Servs. & Aging Comm., 129th Gen. Assemb., Reg. Sess. 1–2 (Ohio 2011) (statement of Shaun Petersen, Trustee, Ohio Right to Life).

¹²¹ “Might,” because a question does exist about whether the “medical emergency” provisions of H.B. 125 go far enough to satisfy existing rules about the permissible scope of abortion regulations after viability. See Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(C)(1), (D)(1)) (providing for an exception “when a medical emergency exists that prevents compliance with this [provision]”).

have the disclosure and acknowledgment rule operate at the same time? Does this serve any purpose other than the symbolic one of making a woman listen to and acknowledge what the State believes are the material dimensions of a choice she is broadly foreclosed from making?¹²² Can the State require her to give her informed consent to a procedure she is legally forbidden from giving informed consent to? The Supreme Court's existing abortion jurisprudence may not clearly capture these concerns as constitutional flaws of and in H.B. 125. But H.B. 125 nevertheless frames the question: Is there some constitutional point after viability when the State's regulatory authority is seen as going a step—or more than a step—too far?

In any event, perhaps what is being imagined by the proposed legislation is that the disclosure and acknowledgment rule will have some practical effect in those cases in which, after a fetal heartbeat has been detected and after viability, a pregnant woman is nevertheless allowed to terminate her pregnancy because of the threat it poses to her life or certain dimensions of her health. Under those circumstances, a constitutional question may exist about whether the disclosure and acknowledgment rule might serve in individual cases to increase the medical dangers a pregnant woman faces. If it does, even though the disclosure and acknowledgment rule might itself be constitutional on its face after the point of fetal viability, it could be said to run afoul of the Court's abortion-rights case law as applied in individual cases. At the very least, the State might be put to its proofs on these questions.

IV. A PROSPECTIVE CONSTITUTIONAL ANALYSIS OF HOUSE BILL 125

To recap to this point: H.B. 125 is broadly unconstitutional. It goes too far in blocking post-heartbeat but pre-viability abortions, and it fails to allow post-viability abortions where necessary to protect the life and the health of a pregnant woman, where health, constitutionally speaking, is broadly defined. Its disclosure and acknowledgment rule is likewise unconstitutional prior to viability, though after viability, existing constitutional rules appear comfortably to allow it, though not unproblematically, given that, in the run of cases when considered alongside H.B. 125's no post-heartbeat abortion rule, it will not serve any informed consent function. The multiple constitutional violations thus worked by H.B. 125 in its current form thus practically mean that its only chance of surviving intact in the face of the constitutional challenges that would be sure to come if the measure ever became law, would be if the U.S. Supreme Court ultimately decided to use the measure—or one like it—as an occasion for rewriting the constitutional rules that presently define the meaning and scope of women's reproductive rights.

¹²² Forte inverts this point, suggesting that H.B. 125 can be understood as an informed consent rule with "an astounding bonus," namely, the ban on post-heartbeat abortions. See *Forte Senate Testimony*, *supra* note 2, at 3.

But will it?¹²³

The Supreme Court's decision several years ago in *Gonzales v. Carhart*¹²⁴ offers what some proponents and supporters of H.B. 125 might regard as, by far, the brightest sign of hope that it will. In this case, the Supreme Court allowed Congress to block doctors from performing, hence women from choosing, an abortion procedure known as intact dilation and evacuation, perhaps more familiarly, "partial-birth" abortion.¹²⁵ The Court reached this conclusion even though the Federal Partial-Birth Abortion Ban Act had some pre-viability applications,¹²⁶ and notwithstanding the fact that the measure contained no general exception safeguarding women's health.¹²⁷ If the Supreme Court was prepared to uphold the Federal Partial-Birth Abortion Ban Act under those circumstances, might it not also be willing to uphold H.B. 125? Might *Gonzales v. Carhart* not indicate the Supreme Court is willing to make deeper and more thoroughgoing alterations to its constitutional abortion rules?

Anything is possible. But proponents and defenders of H.B. 125 should be careful not to pin too many hopes or dreams on the Court's *Gonzales v. Carhart* decision. Yes, that decision upheld an abortion regulation with some pre-viability application that restricted women's reproductive choice. And yes, it allowed the federal abortion measure to stand without a broad exception for women's health. Indeed, as has been noted in the debates over H.B. 125, the decision even seemed to register a rhetorical shift—using language more sympathetic to the right-to-life movement than earlier constitutional abortion decisions have and did.¹²⁸ But for all that, *Gonzales* does not, properly understood, indicate the State can enact and succeed in defending a measure like H.B. 125. Nor, for that matter, does the decision suggest the Supreme Court is prepared to rewrite its abortion jurisprudence in a way that would make room for H.B. 125 to stand.

An explanation begins with what the Court's opinion in *Gonzales v. Carhart* teaches about the permissibility of pre-viability abortion regulations.

¹²³ Portions of what follow appeared in Marc Spindelman, Guest Column, *Anti-Abortion 'Heartbeat Bill' Unlikely to Withstand Court*, CINCINNATI ENQUIRER, Apr. 24, 2011, at F2.

¹²⁴ 550 U.S. 124 (2007).

¹²⁵ *Id.* at 147 (internal quotation marks omitted); *id.* at 170 n.1 (Ginsburg, J., dissenting).

¹²⁶ *Id.* at 156 (majority opinion).

¹²⁷ *Id.* at 161; *see also id.* at 172 (Ginsburg, J., dissenting).

¹²⁸ *See Strang Senate Testimony*, *supra* note 2, at 9. For more on the rhetorical shift found in *Gonzales v. Carhart*, see Caitlin E. Borgmann, *The Meaning of "Life": Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 561–62 (2009); Linda Greenhouse, *How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse*, 42 SUFFOLK U. L. REV. 41, 55–56 (2008); Justin Murray, *Exposing the Underground Establishment Clause in the Supreme Court's Abortion Cases*, 23 REGENT U. L. REV. 1, 44–45 (2011); Ronald Turner, *Gonzales v. Carhart and the Court's "Women's Regret" Rationale*, 43 WAKE FOREST L. REV. 1, 4 (2008); Jennifer Baker, Note, *A War of Words: How Fundamentalistic Rhetoric Threatens Reproductive Autonomy*, 43 U.S.F. L. REV. 671, 682–83 (2009); Laura J. Tepich, Note, *Gonzales v. Carhart: The Partial Termination of the Right to Choose*, 63 U. MIAMI L. REV. 339, 377, 383–84 (2008).

Though the opinion did uphold a ban on partial-birth abortions with some pre-viability application, it did so while emphasizing just how limited the ban's pre-viability reach was. Crucial to the Court's *Gonzales* ruling was the fact that the federal abortion ban blocked only one single—and pre-viability, a relatively uncommon¹²⁹—method of abortion. And it did this while leaving a closely related and more conventional method of performing pre-viability abortions entirely outside its reach.¹³⁰ Pre-viability partial-birth abortions could thus be restricted—and were—without generally restricting or unduly limiting a woman's right to choose.¹³¹ Or, Congress concluded, endangering women's health.¹³² What is more, the Court's *Gonzales* opinion noted that the banned abortion procedure, with slight variation, might still be performed with legal impunity under federal law if the more standard procedure, once initiated, did not work out.¹³³ Women's abortion rights, if somewhat diminished, were seen to remain otherwise generally intact.

In this light, whatever else *Gonzales v. Carhart* is, it is no endorsement of aggressive pre-viability abortion bans like H.B. 125,¹³⁴ which could regularly block abortions from six to eight weeks gestation, on.¹³⁵ Nothing in this decision shows a majority of the Supreme Court itching or predisposed to reconsider the basic architecture of existing abortion rules.¹³⁶ Over dissenting complaints, the Court resisted the idea it was rewriting abortion doctrine,¹³⁷ quoting with approval and subsequently applying *Planned Parenthood of Southeastern Pennsylvania v. Casey*'s pre-viability "undue burden" test.¹³⁸ In this sense, without much fanfare, the *Gonzales* Court quietly conformed its decision to the four corners of existing constitutional abortion rules. Lest it be missed, these rules, found in precedents acknowledged and relied on by *Gonzales*, and which include *Casey*¹³⁹ and even *Roe v. Wade*,¹⁴⁰ are the very same precedents that would have to be toppled to make way for H.B. 125's post-heartbeat, pre-viability abortion ban to stand. If overturning those precedents is one's goal, *Gonzales v. Carhart* is less a solution than part of the problem.

¹²⁹ See *Gonzales v. Carhart*, 550 U.S. at 134–40, 165.

¹³⁰ *Id.* at 150, 164–65; see also *id.* at 134 (discussing other abortion procedures left untouched by the Federal Partial-Birth Abortion Ban Act).

¹³¹ *Id.* at 155–56.

¹³² See *id.* at 161–67.

¹³³ *Id.* at 155–56.

¹³⁴ Cf. *Gonzales v. Carhart*, 550 U.S. at 134 (noting the federal law at issue in the case did not ban many pre-viability abortions).

¹³⁵ E-mail from David Colombo, M.D., to author, *supra* note 50; see also Jon Craig, *Bill Would Ban Abortions Once Heartbeat Detected*, CINCINNATI ENQUIRER, Feb. 8, 2011, at B3 (six to eight weeks); Candisky, *supra* note 50, at B1 (six to seven weeks).

¹³⁶ See, e.g., *Gonzales v. Carhart*, 550 U.S. at 145–46.

¹³⁷ See *id.* at 145.

¹³⁸ *Id.* at 145, 147, 150, 156, 158, 164, 168.

¹³⁹ 505 U.S. 833 (1992).

¹⁴⁰ 410 U.S. 113 (1973).

Much the same can be said in relation to the *Gonzales* Court's treatment of the constitutional rules governing post-viability abortions. While Justice Ginsburg found the Court's opinion in the case "alarming,"¹⁴¹ because, among other things, "for the first time since *Roe*, the Court [has] blesse[d] a[n abortion] prohibition with no exception safeguarding a woman's health,"¹⁴² *Gonzales* does not categorically pre-clear any and all abortion restrictions lacking express and broad exceptions providing for women's health. To the contrary, in general terms, the Court's *Gonzales* opinion indicated its approval of the "confirmation" by *Casey* of "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health."¹⁴³ Indeed, *Gonzales v. Carhart* went out of its way to state that "[t]he prohibition in the [Partial-Birth Abortion Ban] Act would be unconstitutional, under precedents we here assume to be controlling, if it 'subject[ed] [women] to significant health risks.'"¹⁴⁴ Thus did the *Gonzales* Court zero in on the question it believed it needed to address: Not whether the Federal Partial-Birth Abortion Ban Act could constitutionally subject women to significant health risks; the answer to that question was emphatically "no." Rather, the question the Court understood to have before it was "whether the Act creates significant health risks for women" as a matter of fact.¹⁴⁵ To answer that question, and thus to determine the constitutional significance of the Federal Partial-Birth Abortion Ban Act's failure to contain an express health exception, the Court made an important comparative judgment. Was the type of partial-birth abortion banned by the federal law at issue in the case safer than similar procedures it did not outlaw? Put differently, and more directly, did "the [Partial-Birth Abortion Ban] Act's prohibition . . . ever impose significant health risks on women"?¹⁴⁶ On this question, the Court said there was medical disagreement, uncertainty, and doubt—disagreement, uncertainty, and doubt that, in its judgment, did not "foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden."¹⁴⁷ Importantly, the Court continued a few pages on:

Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere

¹⁴¹ *Gonzales v. Carhart*, 550 U.S. at 170 (Ginsburg, J., dissenting).

¹⁴² *Id.* at 171.

¹⁴³ *Id.* at 145 (majority opinion) (citing *Casey*, 505 U.S. at 846).

¹⁴⁴ *Id.* at 161 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006)).

¹⁴⁵ *Id.* at 161.

¹⁴⁶ *Id.* at 162.

¹⁴⁷ *Gonzales v. Carhart*, 550 U.S. at 164 (internal citation omitted).

convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.¹⁴⁸

"Considerations of marginal safety" may, as the Court says, be "within the legislative competence when the regulation is rational and in pursuit of legitimate ends."¹⁴⁹ But these considerations—as the Court approved them in the context of the facial challenge at issue in *Gonzales v. Carhart*—assumed, and assumed over and over again, the availability of safe alternatives to the banned abortion procedure that pregnant women could legally avail themselves of. The constitutional legitimacy of the federal partial-birth abortion ban, in other words, turned on the Court's view that prohibiting the single partial-birth abortion procedure it did, did not impose any substantial risks on pregnant women's health, only "mere convenience."¹⁵⁰ At most, said the Court, "[c]onsiderations of marginal safety" were in play.¹⁵¹ But the safety of women's health was fundamentally guaranteed by the federal legislation: not, interestingly enough, by virtue of the solitary procedure it banned,¹⁵² but instead by virtue of the abortion procedures it chose to leave legally untouched.

H.B. 125 cannot be similarly saved. The constitutional question its health-related exception presents is a very different one than the one settled by *Gonzales v. Carhart*. It is: Does a far-reaching ban on post-heartbeat abortions satisfy constitutional demands if it contains no general health exception, but only a limited provision for abortions needed to preserve the life of a pregnant woman or to prevent her from confronting a "serious risk of . . . substantial and irreversible impairment of . . . major bodily functions"?¹⁵³ Insofar as H.B. 125's post-heartbeat abortion ban leaves women "'subject[ed] . . . to [a range of] significant health risks'"¹⁵⁴—short of or other than "substantial and irreversible impairment[s] of . . . major bodily function[s]"¹⁵⁵—risks that terminating pregnancy would obviate, the lesson of the Supreme Court's abortion

¹⁴⁸ *Id.* at 166–67.

¹⁴⁹ *Id.* at 166.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Nor, for that matter, in an express guarantee of an exception to its rule in cases where abortions were necessary to protect women's health.

¹⁵³ H.B. 125, 129th Gen. Assemb., Reg. Sess. § 1 (Ohio 2011) (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)(a)).

¹⁵⁴ *Gonzales v. Carhart*, 550 U.S. at 161 (first alteration in original) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006)).

¹⁵⁵ Ohio H.B. 125 (as passed by Ohio House, June 28, 2011) (to enact OHIO REV. CODE § 2919.19(E)(2)(a)).

jurisprudence, reaffirmed in *Gonzales v. Carhart*, is that H.B. 125 is in various respects unconstitutional.¹⁵⁶

V. CONCLUSION

Drawing together the strands of the preceding analysis in summary by way of conclusion: H.B. 125 is, in many respects, inconsistent with existing Supreme Court precedent, though not in every last respect. Pre-viability, H.B. 125's ban on post-heartbeat abortions violates a pregnant woman's constitutionally protected right to choose. Operating post-viability, by contrast, H.B. 125's ban on post-heartbeat abortions might be acceptable, except for its failure to allow post-viability abortions that are necessary to protect or preserve a pregnant woman's life or health, as required by existing constitutional rules. Likewise, H.B. 125's disclosure and acknowledgment rule is unconstitutional prior to the point of fetal viability, since, working in tandem with H.B. 125's post-heartbeat but pre-viability abortion ban, it is not really an informed consent measure, being all information, and no opportunity for consent. After the point of fetal viability, however, the disclosure and acknowledgment rule appears to be within constitutional precedents allowing the State to go so far as to ban abortion outright, except in cases involving a pregnant woman's life or health. This even though there does seem something excessive about the measure operating when abortion would otherwise be banned. In those circumstances, it seems difficult to see how the measure can very seriously rationally serve or even be said to serve as an informed consent measure. At the same time, there may be constitutional problems with the operation of the disclosure and acknowledgment rule in individual cases. This leaves the possibility that H.B. 125, if enacted, could be upheld if the Supreme Court were willing to rewrite its existing abortion jurisprudence in some significant respects. A close look at some of the important features of the Supreme Court's decision in *Gonzales v. Carhart* suggests that the prospects do not seem especially bright. Or at least they are too dim for any lower court to uphold H.B. 125 by overturning *Roe* and its progeny either in whole or in part.

VI. A POSTSCRIPT

In testimony for the Ohio Senate Health, Human Services, and Aging Committee, David Forte, echoing a point that others made, offered a

¹⁵⁶ The constitutional shortcomings of H.B. 125's existing health-related exception render it problematic after the point of fetal viability. But they also supply an independent reason for thinking the measure unconstitutional as it would operate prior to viability. *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) ("Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation.").

provocative thought supporting H.B. 125.¹⁵⁷ The history of *Roe v. Wade*, he suggested, has, in significant respects, been a history of constitutional retrenchment. "[T]he pro-life movement [has] won many victories when there was never a pro-life majority on the Supreme Court. These victories came because the pro-life movement never gave up, never decided to wait for a political miracle."¹⁵⁸ To illustrate, his testimony mentions a "first in the nation" Ohio measure "banning partial birth abortions"—passed in 1995.¹⁵⁹ No sooner was this measure passed than it was struck down in federal court,¹⁶⁰ though it was soon followed by the enactment of a copycat partial-birth abortion rule in Nebraska,¹⁶¹ also then struck down by the federal courts, including the Supreme Court,¹⁶² only to be rehabilitated by the Congress, which, "[i]n 2003, . . . passed a federal ban on partial birth abortions and invited the Court to change its mind. The Court did, and now *Gonzales v. Carhart* is the law of the land and partial birth abortions are against the law."¹⁶³ Forte's testimony relates a similar story about informed consent rules:

Some years back Akron passed a law requiring informed consent, a waiting period, and parental consent for minors seeking abortion. The Supreme Court said that Akron's law was unconstitutional. But other states did not wait for a better day. They kept inviting the Court to change its mind. And the Court did. Now Ohio and most states have laws requiring informed consent, a waiting period, and parental consent or notification.¹⁶⁴

With other examples in mind, the political moral Forte intends takes shape: H.B. 125, "aggressive in its defense of unborn human individuals possessing a heartbeat," is out ahead of the Court's current abortion jurisprudence, "[i]t does not wait," "[i]t goes forward" . . . "prudent[ly]," in Forte's view, but forward just the same.¹⁶⁵

¹⁵⁷ See Forte Senate Testimony, *supra* note 2, at 4. Similar arguments can be found in Porter Senate Testimony, *supra* note 7, at 2–3 and Weber Senate Testimony, *supra* note 7, at 4–5.

¹⁵⁸ Forte Senate Testimony, *supra* note 2, at 4.

¹⁵⁹ *Id.* Janet (Folger) Porter repeats the claim to originality. Porter Senate Testimony, *supra* note 7, at 1; see also Letter from John C. Willke, M.D., President, Life Issues Institute, Inc., to Ohio General Assembly Members (Feb. 15, 2011) (on file with author) (same).

¹⁶⁰ See *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1092–94 (S.D. Ohio 1995) (granting a temporary restraining order), *aff'd*, 130 F.3d 187, 190 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998).

¹⁶¹ NEB. REV. STAT. § 28-328 (1997).

¹⁶² *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1100 (D. Neb. 1998), *aff'd*, 192 F.3d 1142, 1145 (8th Cir. 1999), *aff'd*, 530 U.S. 914, 922 (2000).

¹⁶³ Forte Senate Testimony, *supra* note 2, at 4. This is partially right, see *supra* text accompanying notes 124–56 (discussing *Gonzales v. Carhart*'s approval of the Federal Partial-Birth Abortion Ban Act).

¹⁶⁴ Forte Senate Testimony, *supra* note 2, at 4.

¹⁶⁵ *Id.* Why this measure is prudent is that "[i]t leaves untouched other interests that the courts have been sensitive to." *Id.* These include contraceptives, "[t]he question of the status

Seen this way, H.B. 125 boldly presents the Supreme Court the occasion for cutting back on *Roe v. Wade*. Without doubt, if passed, it would offer the Court an opportunity to give States permission to enact fresh measures that, like H.B. 125, significantly constrain and in some cases maybe even practically eliminate women's abortion rights, if not simply after the detection of a fetal heartbeat then perhaps also—before too long—from the point of conception on. A decision on the constitutionality of H.B. 125 might itself overturn *Roe* or pave a certain way for its demise.¹⁶⁶

This is a powerful exhortation to pro-life political actors to act by passing H.B. 125. So far it has not succeeded in Ohio, even to persuade the right-to-life movement in the state to close ranks and join cause around the measure. A reason is in what Forte's testimony does not quite say: the boldness, the aggressiveness, of H.B. 125, as a very deep challenge to the Supreme Court's existing jurisprudence, distinguishes it from the other measures Forte himself describes, which seem notable for their incrementalism, and which, perhaps in some sense as a function of that, the Supreme Court has, sooner or later, upheld. By contrast, H.B. 125 refuses "molar to molecular"¹⁶⁷ motions, seeking to be a test case for a radical leap in constitutional abortion law.

It is unclear at this point what will happen with H.B. 125. It has already passed in the Ohio House of Representatives once. Will it pass again? Will it become law? If it does not, one reason will be that constitutional doctrine has worked as many think it should: to shape and constrain politics. This even as the political branches retain the power, if not quite the authority, to play an active role in the "vital national seminar" about the meaning of the U.S. Constitution that shapes the country's basic law.¹⁶⁸

of embryos," and "a necessary range of discretion in the doctor/patient relationship." *Id.* at 4–5. Other states are also considering heartbeat-related legislation. The Arkansas Legislature recently overrode a gubernatorial veto to enact the "Arkansas Human Heartbeat Protection Act," which requires testing for fetal heartbeats and prohibits abortions where a heartbeat has been detected and where the fetus is twelve or more weeks in gestation. Arkansas Human Heartbeat Protection Act, No. 301, 2013 Ark. Acts __ (codified as amended at ARK. CODE § 20-16-1301 to -1307), available at <http://www.arkleg.state.ar.us/assembly/2013/2013R/Acts/Act301.pdf>. North Dakota has also recently passed a heartbeat bill. See H.B. 1456, 63rd Leg. Assemb., Reg. Sess. (N.D. 2013). Other states may follow a similar path. See, e.g., H.B. 132, 2013 Leg., Reg. Sess. (Ky. 2013); H.B. 97, 62d Leg., Reg. Sess. (Wyo. 2013); H.B. 2103, 87th Leg., Reg. Sess. (Minn. 2012); H.B. 1196, 2012 Leg., Reg. Sess. (Miss. 2012).

¹⁶⁶ See Forte House Testimony, *supra* note 2, at 3 ("Thus, this is the time for another new invitation, like so many that have been accepted in the past, for the Court to adjust its position, in the light of modern scientific evidence, and allow for more protection of the unborn."); see also Forte Senate Testimony, *supra* note 2, at 6 ("Thus, by the time this law completes its journey, we may have a new Supreme Court after all. . . . If . . . the Court has a majority that understands the Constitution correctly, then this bill is ready to make history.").

¹⁶⁷ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1916).

¹⁶⁸ Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) ("The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.").

How much does the Constitution as interpreted by the Supreme Court constrain politics? How much should it? Whether H.B. 125 ultimately passes in Ohio or not, Forte's testimony opens a larger set of constitutional themes, actively imagining a kind of constitutional agency with aspirations that do not depend on the Supreme Court to declare the ultimate horizon of possibility. Whatever one makes of the substance of H.B. 125, seen through the lens Forte's testimony offers, it is a bid for the state legislature not only to rewrite local law, but also to claim a role in defining our country's shared constitutional present—and future. One can endorse or oppose that vision, and vigorously, while recognizing the impulse behind it for what it is: the impulse to work through our political institutions to define or redefine the shared values that state not only the content of positive law, but us, ourselves, collectively as a people, and our shared way of life.

For some, this is precisely why H.B. 125 is suspect. It is deeply, if not entirely, out of tune with our constitutional values, as reflected in Supreme Court precedent. While this is a sufficient answer to H.B. 125's constitutionality—for now—what may be the most significant feature about the measure is how it reflects an unrelenting desire and willingness, agree or do not, to use the political processes to call existing constitutional values to question, in order to change them. Though H.B. 125, if enacted, could not be upheld in its entirety without very significantly and perhaps fundamentally rewriting *Roe v. Wade* and its progeny, important as that is, something significant is missed by only looking at the measure as a function of existing constitutional doctrine. What one loses is the commitment, the drivenness, the engagement, the passions of the forces on different sides of the debate surrounding H.B. 125, including the wildly complex clashes of wildly complex and numerous worldviews that the bill's introduction both reflects and precipitates.

Absent any serious constitutional questions about how to dispose of H.B. 125 should it become law, there is nevertheless a question that should be more actively pursued than it presently is in legal circles inside and outside the academy, about where and how the kind of clashes reflected in and precipitated by H.B. 125, but by no means limited to it, should be resolved, and what is gained and what may be lost by saying these cases involve constitutional matters ultimately for legal disposition by the courts instead of political disposition by and in the people's houses, like the Ohio legislature.

James Bradley Thayer famously noted the possibility that a Supreme Court-centered constitutionalism exercising the power of judicial review could have enervating effects on ordinary politics, causing "the people . . . [to] lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way . . ."¹⁶⁹ The debates surrounding H.B. 125 show that, notwithstanding judicial review and the judicial supremacy that presently attends it, "the political capacity of the people"¹⁷⁰ has not been

¹⁶⁹ JAMES BRADLEY THAYER, JOHN MARSHALL 106 (1901).

¹⁷⁰ *Id.* at 107.

lost, nor, for that matter, their “sense of moral responsibility”¹⁷¹—on any of the sides within these debates. To the contrary, the political debates surrounding H.B. 125 shows politics are alive and well, if not always for various reasons evenly matched, and if otherwise still intensely mediated by a Supreme Court-centered constitutionalism that securely operates with judicial review and judicial supremacy at its core. Without agreeing, much less urging, that *Roe v. Wade* and its progeny protecting women’s reproductive rights should be overturned, whether on the grounds of their immorality or anything else, it is hard not to wonder, in light of H.B. 125, and the constitutional conclusions about it that have been and must be reached: What would politics, in Ohio and elsewhere, look like, what would they be like, how might they feel, how might they flourish—or not—if the Supreme Court and its interpretations of the U.S. Constitution were not as central as they presently are to legislative and other political debates?¹⁷²

¹⁷¹ *Id.*

¹⁷² Some important thoughts in these directions are in Robin L. West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009).



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